Supreme Court, U.S.
FILED

01 642 OCT 09 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Terry D. Hostin,

Petitioner,

v.

The Arizona Schools for the Deaf and Blind, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

R. KELLY HOCKER, ESQ.
Counsel of Record

1287 OVERLOOK DRIVE
SIERRA VISTA, ARIZONA 85635
(520) 417-0871

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

113P.

QUESTIONS PRESENTED

1. Does the Eleventh Amendment bar Americans with Disabilities Act ("ADA") claims against states that have abolished or otherwise waived sovereign immunity?

2. Does Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, (2000) preclude summary judgment when the plaintiff presents a prima facie case of discrimination and direct and circumstantial evidence of pretext?

3. Given the liberal notice pleading requirements of Federal Rules of Civil Procedure 8(a) and the District Court's finding of retaliation satisfying the requirements of Yartzoff v. Thomas, 809 F. 2d 1371 (9th Cir. 1987), cert. denied, 498 U. S. 939 (1990), was it error for the Court of Appeals to refuse to consider Petitioner's retaliation claims?

PARTIES TO THE PROCEEDINGS

Petitioners

Terry D. Hostin

Respondents

Arizona Schools for the Deaf and Blind, a body corporate with perpetual succession created under the laws of the State of Arizona; Kenneth R. Chiaro, Dr., former President of the Arizona Schools for the Deaf and Blind (ASDB) Board of Directors; Gail Harris, Dr., former Arizona Schools for the Deaf and Blind (ASDB) Board Secretary; Karen Davis, Arizona Schools for the Deaf and Blind (ASDB) Board Member; Marcia Smith, Arizona Schools for the Deaf and Blind (ASDB) Board Member; Joanne Tripi, Arizona Schools for the Deaf and Blind (ASDB) Board Member.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT FOR GRANTING WRIT 4

ARGUMENT 1
The Court Of Appeals Erred In Dismissing Petitioners ADA Claims Based On Sovereign Immunity 5

ARGUMENT 2
Contrary To This Court's Decision In Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000), the District Court abrogated Mr. Hostin's right to have the jury decide the facts. 8

ARGUMENT 3
Given the liberal notice pleading requirements of Federal Rules of Civil Procedure 8(a) and the District Court's finding of retaliation satisfying the requirements of Yartzoff v. Thomas, 809 F. 2d 1371 (9th Cir. 1987), cert. denied, 498 U. S. 939 (1990), was it error for the Court of Appeals to refuse to consider Petitioner's retaliation claims?. 14

CONCLUSION 17

APPENDIX 1a

APPENDIX A
Court of Appeals
Memorandum 5/30/01 . . . . . 1a-6a
APPENDIX B
Court of Appeals Order 7/10/01 . . . . 7a-9a
APPENDIX C
District Court Order 1/31/00 . . . . 10a-56a
APPENDIX D
District Court Order 12/24/97 . . . 57a-76a
APPENDIX E
42 U.S.C.A. § 12101(a), et al. . . . 77a-80a
APPENDIX F
Rehabilitation Act of 1973 . . . . . 81a-82a
APPENDIX G
A.R.S. § 12-820.01, et al. 83a-85a

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 10

Barnett v. U. S. Air, Inc.,
196 F 3d 979 (9th Cir. 1999) 14

Board of Trustees of the University of Alabama v. Garrett,
531 U.S. 356, 121 S.Ct. 955 (2001) . . . . . passim

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 15

Chuang v. University of California,
225 F.3d 1115 (9th Cir. 2000) 11

Continental Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690, 696, n.6 (1962) 10

EEOC v. Board of Governors of State Colleges and Universities,
957 F. 2d 424 (7th Cir.) cert. denied,
506 U. S. 906 (1996) 15

Godwin v. Hunt Wesson, Inc,
150 F.3d 1217 (9th Cir. 1998) 11

Gunter v. Atlantic Coast Line R.R.,
200 U.S. 272 (1906) 7

Hill v. Blind Indus. and Serv.,
179 F.3d 754 (9th Cir. 1999) 6

Lam v. University of Hawaii,
40 F.3d 1551 (9th Cir. 1994) 8

Lee v. City of Los Angeles,
250 F. 3d 668 (9th Cir. 2001) 17

Lowe v. City of Monrovia,
775 F.2d 998 (9th Cir. 1985) 12

Lytle v. Household Mfg., Inc.,
494 U.S. 545 (1990) 10

McDonnell Douglas v. Green,
411 U.S. 792 (1973) 8, 12

Port Authority Trans-Hudson Corp. v. Feeney;
495 U.S. 299 (1990) 5

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) . . . . . passim

Republic Ins. Co. v. Fiedler,
875 P.2d 187 (Ariz. App. 1994) 6

Schnidrig v. Columbia Machine, Inc,
80 F.3d 1406 (9th Cir. 1996) 12

Sischo-Nownejad v. Merced Community College Dist.,
934 F.2d 1104 (9th Cir. 1991) 8, 12

Soileau v. Guilford of Maine, Inc,
105 F. 3d 12 (1st Cir. 1997) 16

St. Mary's Honor Society v. Hicks,
509 U.S. 502 (1993) 11, 12

Stone v. Arizona Highway Comm'n.,
93 Ariz. 384,
381 P.2d 107 (Ariz. 1963) 5

U.S. Postal Servs. Bd. of Governors v. Aikens,
460 U.S. 711 (1983) 8

Washington v. Garrett,
10 F.3d 1421 (9th Cir. 1993) 12

Yartzoff v. Thomas,
809 F. 2d 1371 (9th Cir. 1987),
cert. denied, 498 U. S. 939 (1990) . . i, 14-15, 16

STATUTES

28 U.S.C. §§ 1254(1) 1
28 U.S.C. §§ 2106 1
29 U.S.C. §794 . . . . . 2, 14
42 U.S.C. § 12101 2
42 U.S.C. § 12101 (a) (7) 17
42 U.S.C. § 12132 2
42 U.S.C. § 12203 . . . . . 2, 14
34 CFR § 104.4 2
34 CFR § 104.11 2
Fed R. Civ. Pro. 8(a)(2) 17
Fed R. Civ. Pro 12(b)(6) 17

ARS § 12-820 2
ARS § 12-820.01 . . . . . 2, 6
ARS § 12-820.02 . . . . . 2, 6
ARS § 15-1302 2
ARS § 15-1303 2
ARS § 15-1304 2
ARS § 41-1461, et seq. 14, 17

ARS § 41-1463 2
ARS § 41-1464 2

OPINIONS BELOW

There are no published opinions below. The United States Court of Appeals for the Ninth Circuit entered its Order on July 10, 2001. (Appendix B at 7a to9a.) The United States District Court for the District of Arizona entered its Order disposing of certain claims on December 24, 1997. (Appendix D at 57a to 76a and entered final judgment on January 31, 2000. (Appendix C at 10a to 56a.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Order on May 30, 2001. (Appendix A at 1a-6a) On June 12, 2001, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which the Court of Appeals denied on July 10, 2001. (Appendix B at 7a to 9a.) This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing En Banc. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const., amend. XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Americans with Disabilities Act

42 U.S.C. §§ 12101, 12132 and 12203. (Appendix E at 77a-80a)

Rehabilitation Act of 1973

29 U.S.C. § 794, 34 CFR §§ 104.4 and 104.11. (Appendix F at 81a-82a)

Arizona Revised Statutes

Arizona Revised Statutes § § 12-820, 12-820.01, 12-820.02, 15-1302, 15-1303, 15-1304, 41-1463, and 41-1464. (Appendix G at 83a-85a)

STATEMENT OF THE CASE

Petitioner, Terry D. Hostin ("Mr. Hostin"), is a profoundly deaf educator who was hired as a school principal by the Arizona School for the Deaf and Blind ("ASDB") at its Phoenix facility. As an administrator, before his termination, and since his subsequent employment as Dean of Students at Louisiana School for the Deaf and Blind, Mr. Hostin received excellent performance evaluations at ASDB. The one exception to his record of excellence are two simultaneous negative evaluations prepared by his supervisor at ASDB after Mr. Hostin was terminated from ASDB and after he had filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Mr. Hostin's termination coincided with the dismissal or demotion of all but one other profoundly deaf administrators at the Phoenix ASDB facility. All were replaced by hearing (non-deaf) administrators.

The District Court found a prima facie case of discrimination and retaliation. Despite these findings, the District Court concluded, as a matter of law, that Mr. Hostin did not prove adverse employment actions against him showing discrimination or retaliation. The Court of Appeals concurred that Mr. Hostin presented a prima facie case of discrimination. Both the Court of Appeals and the District Court found ASDB's proffered non-discriminatory reasons for Mr. Hostin's termination-- that Mr. Hostin lacked leadership skills -- were not pretextual and, therefore, were sufficient to support dismissal of his discrimination and retaliation claims on motions for summary judgment. The District Court weighed the evidence and made its own factual determination - that Mr. Hostin failed to solve a personnel problem. Consequently, Mr. Hostin was denied a trial by jury on the purely factual issue of whether the employer's proffered reasons for termination were a pretext for discrimination.

The Court of Appeals refused to review the District Court's dismissal of the retaliation claim based solely on its own assessment that Mr. Hostin did not state a claim for retaliation under the Arizona Civil Rights Act ("ACRA"), which was not an issue on appeal, but which was plainly plead and cited in Mr. Hostin's amended complaint. The Court of Appeals simply ignored that relief for retaliation was also available under the ADA and the Rehabilitation Act. Without considering whether Arizona had waived Eleventh Amendment immunity, the Court of Appeals found that under Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955 (2001), Mr. Hostin could not seek money damages because ASDB is a state agency. Even though ASDB raised the privilege of governmental immunity for the first time on appeal, the Court of Appeals granted judgment to ASDB on this alternative ground. Garrett was decided just before oral argument in this matter and was not

briefed by the parties. Mr. Hostin took his only opportunity, during oral argument on appeal, to argue that the Arizona Legislature did not provide for governmental immunity for lawsuits against the ASDB for the conduct alleged.

The Court of Appeals affirmed the District Court decision on the issue of retaliation without review of the lower court's decision; affirmed the district court's order to dismiss the claim of discrimination based solely on a factual determination; and failed to consider the remaining appeal issues.

On motion for reconsideration, the Court of Appeals refused to correct an obvious error in finding that Mr. Hostin had not sought relief under the ACRA, despite plain language in two sections of the amended complaint citing to that statute.

ARGUMENT FOR GRANTING WRIT

Eleventh Amendment immunity under Garrett was raised for the first time in this case on appeal. Garrett was decided after the appeal was briefed, but before oral argument. The Court of Appeals decided this case based on Garrett even though the forum state had, long before, abolished sovereign immunity. With virtually no analysis, the Court of Appeals elevated the affirmative defense of Eleventh Amendment immunity to an absolute jurisdictional bar to ADA claims against a state. The Court never considered that a state can waive immunity or consent to suit as Arizona and ASDB did here. This case illustrates the importance of and the need for guidance to properly apply and interpret Garrett. The Court of Appeals committed reversible error.

The Court of Appeals failed to apply the law articulated in Reeves v. Sanderson Plumbing Prods., Inc.,

530 U.S. 133, 147 (2000). While acknowledging a prima facie case of discrimination and retaliation, the Court declined to permit the issue of pretext and intentional discrimination to be weighed by the finder of fact. Whether the proffered nondiscriminatory reason for the adverse action was pretext is necessarily a jury question. The grant of summary judgment was error. Courts that ride roughshod over the province of the jury should be reined in. Courts that neglect to apply the law articulated by this Court should be corrected.

ARGUMENT 1

The Court Of Appeals Erred In Dismissing Petitioners ADA Claims Based On Sovereign Immunity.

Relying on Garrett, the Court of Appeals found that ASDB was entitled to Eleventh Amendment immunity from suits for money damages under the ADA. Appendix A at 3a (citing Garrett, 531 U.S. 356 (2001)). The Court of Appeals arrived at its analysis without the benefit of a record and briefing on the issue, and ignores Garrett with respect to the possibility that Eleventh Amendment immunity was waived. See 531 U.S. at _____,121 S. Ct. at 962; see also Port Authority Trans-Hudson Corp. v. Feeney; 495 U.S. 299, 304 (1990)("The Eleventh Amendment bar to suit is not absolute. States may consent to suit in federal court.")

The District Court's analysis ended with its determinations that ASDB is a state agency. As the Court of Appeals did, the District Court presumed immunity without considering waiver. The Court of Appeals' failure to consider waiver is fatal to its decision. Governmental immunity was abolished in Arizona almost forty years ago. Stone v. Arizona Highway Comm'n., 93 Ariz. 384, 392, 381

P.2d 107, 112 (Ariz. 1963)(abolishing the substantive defense of governmental immunity for all future actions.) Subsequently, the Arizona Legislature adopted a statute providing for absolute immunity for public entities in exercising a judicial or legislative function or an administrative function involving the determination of fundamental governmental policy involving the exercise of discretion. A.R.S. § 12-820.01. The Legislature also adopted a qualified immunity statute for public entities and employees for the acts of employees within the scope of their employment who did not intend to cause injury or act with gross negligence. A.R.S. § 12-820.02.

The conduct of ASDB at issue is adverse employment actions taken against Mr. Hostin, a profoundly deaf employee, and all but one other hearing impaired administrative employees culminating in simultaneous discharge or demotion. The actions were not judicial, legislative, or administrative involving a determination of fundamental government policy. ASDB's conduct does not fall within the very limited scope of Arizona's immunity statutes. A contrary conclusion on a motion for summary judgment would be prohibited because whether the employees intended injury is a question of fact reserved for the jury, except in cases where the acts are virtually certain to cause injury, in which case intent is conclusively presumed. Republic Ins. Co. v. Fiedler, 875 P.2d 187, 190 (Ariz. App. 1994).

Eleventh Amendment immunity is a "personal privilege" not affecting subject matter jurisdiction. Hill v. Blind Indus. and Serv., 179 F.3d 754, 760 (9th Cir. 1999). Because Eleventh Amendment immunity is not a limitation on subject matter jurisdiction, "it is difficult to justify or explain a rule that allows this defense to be invoked at any time in the

proceedings." Id. By appearing and litigating on the merits ASDB waived immunity. Id.

> This waiver doctrine is so well settled that in Gunter [v. Atlantic Coast Line R.R., 200 U.S. 272, 284 (1906)], the Court restated the "elementary proposition []" that:
> Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.

Id. 179 F.3d at 760-61. It was error for the Court of Appeals to affirm the District Court's decision based on Garrett.

Because ASDB did not raise Eleventh Amendment immunity under Garrett, until appeal, Arizona has abolished sovereign immunity, and ASDB either does not fall within the scope of Arizona's limited immunity statutes or the issue requires a factual determination, the Court of Appeals reliance on Garrett and the Eleventh Amendment was error.

ARGUMENT 2

Contrary To This Court's Decision In Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000), the District Court abrogated Mr. Hostin's right to have the jury decide the facts.

In employment discrimination cases courts confront some of the most difficult legal issues. This Court recognizes that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." U.S. Postal Servs. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). For this reason, courts have employed some variant of the framework articulated in McDonnell Douglas v. Green, 411 U.S. 792 (1973) to analyze discrimination claims that are principally based on circumstantial evidence.

In the United States Court of Appeals for the Ninth Circuit, "very little evidence" is required to survive summary judgment in a discrimination case "because the ultimate question is one that can only be resolved through a 'searching inquiry'--one that is most appropriately conducted by the factfinder, upon a full record." Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991). Besides providing more particularized factual inquiry, a trial provides insight into motive, a critical issue in discrimination cases. The existence of an intent to discriminate may be difficult to discern in depositions compiled for purposes of summary judgment, yet it may later be revealed in the face-to-face encounter of a full trial. Lam v. University of Hawaii, 40 F.3d 1551, 1564 (9th Cir. 1994).

This disparate treatment discrimination case turned on the evaluation of the legitimacy of the employer's proposed non-discriminatory reason for discharging the profoundly deaf principal of the ASDB. The Court of Appeals for the Ninth Circuit, as did the trial judge below, erroneously viewed that weighing of evidence of pretext as a question for the court. Apparently operating from a perspective that the employee must produce evidence of discrimination, plus other evidence sufficient to meet some elevated standard for proof of pretext the Court of Appeals concluded that, "Hostin failed to produce sufficient evidence to show that ASDB's nondiscriminatory reasons are pretextual." Appendix A at 5a.

The evidence of pretext in this case was significant. Mr. Hostin and all but one of the other deaf administrators employed in Phoenix suffered adverse personnel actions.[1] They were demoted, terminated or told that they would be terminated unless they resigned. There was evidence that the deaf administrators, specifically Mr. Hostin, were victims of a hostile environment and harassment. Deaf administrators suffered abuse by staff and disparate treatment by the Superintendent of ASDB. Despite Mr. Hostin being informed by his supervisor that he was doing an acceptable job and, despite multiple requests by him for evaluation by his supervisor, Mr. Hostin was terminated in the face of evaluations that indicated his performance was never less than acceptable. In a rather wild effort to buttress this deficiency, ASDB sought, and the District Court reluctantly permitted,

---

[1] The supreme irony of this case is that those in Arizona charged with the education of the deaf are unequipped to actually deal with the deaf professionally, and by this conduct, systematically eliminated any and all positive administrative role models for deaf and other disabled pupils.

Intelligence Quotient (I.Q.) testing of Mr. Hostin to be performed in the course of this litigation. The implicit inference of such litigation conduct is that Mr. Hostin either never had or had subsequently lost the mental capacity to perform the duties of a school principal, a ludicrous proposition in light of Mr. Hostin's two masters' degrees and state certification for school administration. ASDB's suggestion that Mr. Hostin was lacking in intelligence smacks of precisely the type of culturally ingrained discriminatory bias against the disabled that the ADA was intended to root out. ASDB's request for I.Q. testing is strong evidence supporting Mr. Hostin's claim. Even if the Court deems all of this evidence minimal, it is still sufficient to permit Mr. Hostin's claim to survive summary judgment under existing Supreme Court and Ninth Circuit precedent. In this case, the Court of Appeals apparently was not constrained by the precedent of this Court.

The Court of Appeals accepted the District Court's revision of ASDB's claimed legitimate non-discriminatory reason for its conduct. This was error. Both courts utterly failed to apply the proper summary judgment standard requiring that Mr. Hostin's facts, and every reasonable inference thereof, be construed in his favor. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55(1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); (The court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence.); Continental Ore Co. v. Union Carbide & Carbon Corp. 370 U.S. 690, 696, n.6 (1962) ("Credibility determinations, the weighing of the evidence, and drawing of legitimate inferences from the facts are jury functions, not those of the judge.")

In fact, the District Court recast ASDB's reason for the adverse personnel action taken against Mr. Hostin in a light more favorable to ASDB, recharacterizing ASDB's vague charge of lack of leadership as the more concrete fault of failing to problem solve and failing to resolve a problem. The Court's recasting of the adverse personnel action and weighing of that claim against Mr. Hostin was error. Assessing credibility and weighing evidence are functions reserved for the jury. "It is not the province of a court to spin evidence in an employer's favor when evaluating its motion" for judgment as a matter of law. Chuang v. University of California, 225 F.3d 1115, 1129 (9th Cir. 2000). The need for the court below to recast ASDB's allegedly legitimate non-discriminatory reason for its conduct proves the pretextual nature of ASDB's proffered reason.

The Court of Appeals' analysis in this case was inconsistent with Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000). Of significance in Reeves was language drawn from St. Mary's Honor Sty v. Hicks, 509 U.S. 502, 511 (1993):

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

Under Reeves, a plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation was "unworthy of credence" because it was internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer. Godwin v. Hunt Wesson, Inc, 150

F.3d 1217, 1220-22 (9th Cir. 1998). These two approaches are not exclusive; a combination of the two kinds of evidence may in some cases serve to establish pretext so as to make summary judgment improper. In either case, however, once a prima facie case is established, the consideration of whether the proffered reason is pretext is a jury question.

A disparate treatment plaintiff survives summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons. Reeves, 530 U.S. at 147 (holding that if factfinder rejects employer's proffered nondiscriminatory reasons as unbelievable, it may infer "the ultimate fact of intentional discrimination" without additional proof of discrimination); see also St. Mary's Honor Society, 509 U.S. at 511. While the plaintiff always retains the burden of persuasion, he does not necessarily have to introduce "additional, independent evidence of discrimination" at the pretext stage. Reeves, 530 U.S. at 147; Schnidrig v. Columbia Machine, Inc, 80 F.3d 1406, 1410-11 (9th Cir. 1996); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993); Sischo-Nownejad, 934 F.2d at 1111; Lowe v. City of Monrovia, 775 F.2d 998, 1008-09 (9th Cir. 1985), amended by 784 F.2d 1407 (9th Cir. 1986).

The District Court and the Court of Appeals found that Mr. Hostin established a prima facie case for disparate treatment and retaliation. Appendix C at 40 a and Appendix A at 4a. The burden of production shifted to ASDB to articulate a nondiscriminatory reason for each adverse employment action (St. Mary's, 509 U.S. at 506-07; McDonnell Douglas, 411 U.S. at 802) which ASDB did. The McDonnell Douglas analysis permitted Mr. Hostin in turn to raise a genuine factual question of whether, viewing the

evidence in the light most favorable to him, ASDB's reasons were pretextual. Mr. Hostin did so by providing direct as well as circumstantial evidence of discrimination. He offered evidence that all but one of the hearing impaired employees were disciplined the same day. Staff were permitted to circumvent the chain of authority, but only when it allowed avoiding deaf administrators, when the chain of command was otherwise scrupulously followed. The proffered reasons arose out of performance evaluations conducted *after* the discriminatory actions. In addition, ASDB regarded him as mentally deficient.

Under Reeves, the jury, not the judge, is charged with assessing the credibility of the "legitimate nondiscriminatory reason" for Mr. Hostin's termination offered up by ASDB. The jury was the judicial body entitled to decide who it believed. If it believed that ASDB's reason was not credible it would be permitted to infer the ultimate fact of intentional discrimination.

> Proof that the defendant's explanation was unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.

Reeves, 133 U.S. at 147. Similarly, finding an explanation for an adverse employment action pretextual can affirmatively support the conclusion that the employer was dissembling to conceal acts of discrimination. Id.

In this case, the indirect evidence and direct evidence were independently sufficient to allow Mr. Hostin to proceed to trial. In evaluating and weighing the credibility of the cumulative evidence respecting Mr. Hostin's alleged lack of leadership, the trial court and the Court of Appeals improperly abrogated to themselves that which is the province of the jury. The evaluation of the evidence, as a part of the "searching inquiry" required by law, should have been left to the fact-finder.

ARGUMENT 3

Given the liberal notice pleading requirements of Federal Rules of Civil Procedure 8(a) and the District Court's finding of retaliation satisfying the requirements of Yartzoff v. Thomas, 809 F. 2d 1371 (9th Cir. 1987), cert. denied, 498 U. S. 939 (1990), was it error for the Court of Appeals to refuse to consider Petitioner's retaliation claims?

The ADA, the ACRA, and the Rehabilitation Act of 1973, prohibits retaliation against a person who has asserted rights under the ADA. See 42 U.S.C. § 12203 (a) [Appendix E]; 29 U.S.C. §794, as amended [Appendix F]; A.R.S. § 41-1461, et seq. [Appendix G].

In order to establish a claim of retaliation Mr. Hostin must show (1) that he was engaged in protected conduct, (2)

that he suffered an adverse employment decision, and (3) that there was a causal connection between the employment decision and the conduct. Yartzoff v. Thomas, 809 F. 2d 1371, 1375 (9th Cir. 1987), cert. denied, 498 U. S. 939 (1990); Barnett v. U. S. Air, Inc., 196 F 3d 979 (9th Cir. 1999).

ASDB conceded that Mr. Hostin's decisions to retain an attorney and to file a complaint with the EEOC are protected activities. Appendix C at 52a-54a ASDB admitted that he assigned Mr. Hostin to work at home because he believed the prospect of litigation interfered unacceptably with Mr. Hostin's ability to manage the school and ASDB's ability to communicate with Mr. Hostin. Appendix C at 54a. The District Court found that Mr. Hostin showed a causal connection between the employment decision and the conduct. Incredibly, the District Court found that Mr. Hostin suffered no adverse employment decision. Mr. Hostin was, therefore, unable to satisfy his burden of proof on the second prong and his claims were dismissed. Appendix C at 54a. The District court erred.

Retaliation is proven by an adverse action, e.g., (1) denial of promotion, (2) refusal to hire, (3) denial of job benefits, (4) demotion, (5) suspension, or (6) discharge. Other adverse actions include threats, reprimands, negative evaluations, harassment, and reassignment with significantly different responsibilities or a significant change in employment status. The suspending or limiting of access to a grievance procedure is also an adverse action. EEOC v. Board of Governors of State Colleges and Universities, 957 F. 2d 424 (7th Cir.) cert. denied, 506 U. S. 906 (1996); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Mr. Hostin was reassigned to work at home, told he would not be paid for earned and vested vacation days, and informed

that he had no budgetary or supervisory responsibilities as a principal. This constituted a significant change in his employment status. Additionally, after he filed his first EEOC charge, a protected activity, Mr. Hostin received the only negative performance evaluation of his career from ASDB, which further constituted an adverse employment action. Thus, the District Court erred in its Order that Mr. Hostin did not satisfy his burden of proof as to adverse employment action constituting retaliation.

A claim for retaliation may be asserted and prevailed upon even if the underlying claim of discrimination is not successful. Soileau v. Guilford of Maine, Inc, 105 F. 3d 12, 16 (1st Cir. 1997). The District Court erred in its decision to dismiss Mr. Hostin's retaliation claim under the ADA, the Rehabilitation Act of 1973, and the ACRA, based only on the District Court's conclusion that there were no adverse employment actions. Two of the three prongs of Yartzoff were satisfied by Mr. Hostin and would prove retaliation. The District Court recognized that Mr. Hostin showed retaliation. He engaged in a protected conduct. There was a causal connection between the employment decision and the conduct.

In its July 10, 2001 order, the Court of Appeals stated:

> As such, because Mr. Hostin only prays for damages under his Retaliation claim that claim fails. This Court does not decide a claim under the Arizona Civil Rights Act because Mr. Hostin did not state such a claim in his Amended Complaint.

Appendix B at 8a.

The Court of Appeals erred in its decision not to review the District Court's Order to dismiss Mr. Hostin's claim for retaliation. First, Mr. Hostin did state a claim of retaliation under the ACRA in his Amended Complaint.

At paragraph 1 at p. 2 of the Amended Complaint, Mr. Hostin, under the Nature of the Action clearly requests remedies and relief under the Arizona Civil Rights Act at lines 3 and 4. In addition, at paragraph 2, the District Court has pendant jurisdiction over state law claims and the Arizona Civil Rights Act, A.R.S. § 41 - 1461 et seq. is specifically identified.

Under Count V of the Amended Complaint, Mr. Hostin set forth facts constituting retaliation and incorporated his previous allegations naming the ACRA and requesting relief under its remedies. Under the liberal system of notice pleading set forth in Federal Rule of Civil Procedure 8(a)(2) and 28 U.S.C.A. This is sufficient to preclude the Court of Appeals from dismissing Mr. Hostin's ACRA claims for allegedly having failed to plead them. Lee v. City of Los Angeles, 250 F. 3d 668 (9th Cir. 2001). Factual allegations set forth in the complaint are taken as true and construed in the light most favorable to plaintiffs. Fed. R. Civ. P. 12(b)(6). The Court of Appeals erred in not reviewing Mr. Hostin's claims of retaliation.

CONCLUSION

Congress adopted the ADA because it found that the disabled have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual

ability of such individuals to participate in, and contribute to, society." 42 U.S.C.A. § 12101(a)(7). Mr. Hostin is a profoundly deaf person. The ASDB subjected him and other hearing impaired individuals to discrimination. The District Court found a prima facie case of discrimination and retaliation, but helped perpetuate the "stereotypic assumptions" that the hearing impaired are mentally impaired by ordering Mr. Hostin to submit to I.Q. testing. The Court of Appeals also found that Mr. Hostin made his prima facie case of discrimination. Then it turned precedent on its head. Both courts ignored Reeves, and usurped the jury's power to make factual and credibility determinations. The Court of Appeals promoted Eleventh Amendment immunity to an absolute jurisdictional bar to ADA suits against any state in derogation of Garrett and refused to consider Mr. Hostin's ACRA claims despite its own precedents enunciating the liberal notice pleading requirement of the Federal Rules of Civil Procedure.

Petitioner seeks reversal of the opinion of the United States Court of Appeals for the Ninth Circuit with instructions to direct a jury trial for Mr. Hostin on the merits of his claims.

The Petition for a Writ of Certiorari should be granted. The proper interpretation of the Eleventh Amendment, Garrett, Reeves, and Federal Rules of Civil Procedure will be furthered. The purposes of the ADA will be served by requiring the people charged with the education of the deaf in Arizona to treat the profoundly deaf as equal members of society.

Respectfully Submitted,

R. KELLY HOCKER, ESQ.
Counsel of Record
1287 OVERLOOK DR.
SIERRA VISTA, ARIZONA 85635
(520) 417-0871

KAY H. HUNNICUTT, ESQ.
KAY H. HUNNICUTT & ASSOCIATES
405 W. SOUTHERN AVE., SUITE 1
TEMPE, AZ 85282
(480) 449-0187

WILLIAM R. HOBSON, ESQ.
LAW OFFICES OF
WILLIAM R. HOBSON
405 W. SOUTHERN AVE., SUITE 1
TEMPE, AZ 85282
(480) 449-3600

KEVIN KOELBEL, ESQ.
LISA COUNTERS, ESQ.
COUNTERS & KOELBEL, P.C.
405 W. SOUTHERN AVE., SUITE 1
TEMPE, AZ 85282
(480) 449-0174

CHERI L. MCCRACKEN, ESQ.
2402 N. 24TH STREET
PHOENIX, ARIZONA 85008
(602) 231-0595

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-15469

Filed May 30, 2001

TERRY D. HOSTIN, *Plaintiff-Appellant*,

v.

ARIZONA SCHOOLS FOR THE DEAF AND BLIND, a body corporate with perpetual succession created under the laws of the State of Arizona; KENNETH R. CHIARO, Dr., former President of the Arizona Schools for the Deaf and Blind (ASDB) Board of Directors; GAIL HARRIS, Dr., former Arizona Schools for the Deaf and Blind (ASDB) Board Secretary; KAREN DAVIS, Arizona Schools for the Deaf and Blind (ASDB) Board Member; MARCIA SMITH, Arizona Schools for the Deaf and Blind (ASDB) Board Member; JOANNE TRIPI, Arizona Schools for the Deaf and Blind (ASDB) Board Member, *Defendants-Appellees*.

MEMORANDUM[1]

Appeal from the United States District Court for the District of Arizona

Robert C. Broomfield, District Judge, Presiding

Argued and Submitted May 14, 2001
San Francisco, California

Before: NOONAN, SILVERMAN, Circuit Judges and SEDWICK[2], District Judge.

Arizona Schools for the Deaf and Blind (ASDB), which is governed by a Board of Directors (ASDB Board), is an agency of the State of Arizona that provides educational services to deaf, blind and sensory-impaired students. In July 1993, Terry D. Hostin (Hostin), who is profoundly deaf, was hired as Principal for the Phoenix Day School for the Deaf (PDSD), one of the schools operated by ASDB. Hostin hired Sandy Jakobs (Jakobs), a deaf individual, as the instructional team leader for the elementary department in 1995. Soon thereafter, some of the teachers complained to Dr. Wilbur Lewis, ASDB's superintendent, about Jakobs. On November 22, 1995, Lewis sent Hostin a letter expressing concern about Jakobs and directing Hostin to address the problem. On

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R.36-3.

[2] The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

March 20, 1995, Lewis met with members of PDSD faculty and staff regarding the problems surrounding Jakobs. On April 4, 1996, the ASDB Board followed Lewis's recommendation and denied renewal of Hostin's employment contract.

Hostin seeks monetary damages and injunctive relief for his claims against ASDB and the ASDB Board for violation of the Americans with Disabilities Act (ADA), violation of the Rehabilitation Act of 1973, and Retaliation.

I. Eleventh Amendment Immunity

Under *Bd. of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001), states are entitled to Eleventh Amendment immunity from suits for money damages under the ADA. *121 S. Ct. at 960.* Hostin has not disputed that ASDB and its Board are state agencies. Recognizing that this Court may affirm a district court's grant of summary judgment on any ground that the record supports, whether or not the district court relied on that ground, *Summers v. A. Teichert & Son, Inc.,* 127 F.3d 1150, 1152 (9th Cir. 1997), we hold that ASDB and its Board are immune from Hostin's claims for compensatory and punitive damages. *See Garrett,* 121 S. Ct. at 960; *Demshki v. California Senate Rules Committee*, No. 00-15599 (9th Cir., May 14, 2001). As such, because Hostin only prays for damages under his Retaliation claim, that claim fails. This Court does not decide a claim under the Arizona Civil Rights Act because Hostin did not state such a claim in his Amended Complaint. However, Hostin's claims for injunctive relief under the ADA and the Rehabilitation Act survive Eleventh Amendment immunity.

II. Disability Discrimination under the ADA and Rehabilitation Act

To survive summary judgment, Hostin must present a prima facie case for disability discrimination by establishing that (1) he is a disabled person within the meaning of the ADA; (2) he is qualified; and, (3) he was discriminated against because of his disability. *See Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996). Hostin has succeeded in presenting a prima facie case of discrimination.

First, ASDB does not dispute that Hostin has a disability. Second, Hostin has sufficiently demonstrated that he was *able* to perform the essential functions of his job with or without reasonable accommodation by producing positive evaluations of his job performance. *See Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 143 L. Ed. 2d 966, 119 S. Ct. 1597 (1999). Third, Hostin produced "evidence adequate to create an inference" that ASDB's decision was based on discrimination, *see O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996), when Hostin showed that he was the first and latest deaf principal at PDSD, and that other deaf employees at PDSD were demoted or resigned on the same day he was informed that his contract would not be renewed.

However, ASDB rebutted Hostin's prima facie case by offering a legitimate nondiscriminatory reason for termination, namely that Hostin's contract was terminated because Hostin failed to solve problems surrounding the

elementary school staff. *See Bradley,* 104 F.3d at 270 (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506-07, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)). Therefore, to avoid summary judgment, Hostin must produce "specific, substantial evidence" that ASDB's stated reasons for not renewing his contract are pretextual. *Bradley,* 104 F.3d at 270 (quoting *Wallis v. J.R. Simplot,* 26 F.3d 885, 890 (9th Cir. 1994)). Hostin failed to produce such evidence.

Although Hostin claims that he adequately asserted leadership to resolve personnel problems, he admits that personnel problems persisted after Lewis instructed him to take initiative in solving the problems. The evidence suggests that Lewis was dissatisfied with Hostin's performance well before he was terminated. With respect to Hostin's contention that ASDB created a hostile environment when it refused to provide reasonable accommodation, Hostin's argument is unpersuasive because Hostin asserts that he was performing his duties in an outstanding manner without such accommodation. *See Buckingham v. United States,* 998 F.2d 735, 742 (9th Cir. 1993) (accommodation not essential to the performance of duties is not required under the ADA). Moreover, Hostin's claims are rebutted by substantial evidence that ASDB provided some accommodation requested by Hostin, including evidence that a TDD system with lights was available to Hostin, and that Hostin had access to a budget, which was never exhausted, from which he could freely use funds to retain services of an interpreter.

Hostin failed to produce sufficient evidence to show that ASDB's nondiscriminatory reasons are pretextual. Therefore, the district court properly granted ASDB's motion for summary judgment on Hostin's claims for discrimination

under the ADA and the Rehabilitation Act. *See Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.).

III. Evidentiary Rulings

Hostin's appeal of various evidentiary motions are unsuccessful because Hostin failed to show that he suffered any prejudice by the district court's rulings on the motions. *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 936 (9th Cir. 1995) (Evidentiary rulings will not provide a basis for reversal absent a showing of prejudice).

Accordingly, the judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15469

Filed July 10, 2001

TERRY D. HOSTIN,
Plaintiff-Appellant,

v.

ARIZONA SCHOOLS FOR THE DEAF AND BLIND, a body corporate with perpetual succession created under the laws of the State of Arizona; KENNETH R. CHIARO, Dr., former President of the Arizona Schools for the Deaf and Blind (ASDB) Board of Directors; GAIL HARRIS, Dr., former Arizona Schools for the Deaf and Blind (ASDB) Board Secretary; KAREN DAVIS, Arizona Schools for the Deaf and Blind (ASDB) Board Member; MARCIA SMITH, Arizona Schools for the Deaf and Blind (ASDB) Board Member; JOANNE TRIPI, Arizona Schools for the Deaf and Blind (ASDB) Board Member,
Defendants-Appellees.

Ninth Circuit Court of Appeals Order 07/10/01

Before: NOONAN, SILVERMAN, Circuit Judges and SEDWICK[1], District Judge.

ORDER

The memorandum disposition filed on May 30, 2001 is amended as follows:

> At page 3, P 1, line 10, insert before "Hostin's":
>
> As such, because Hostin only prays for damages under his Retaliation claim, that claim fails. This Court does not decide a claim under the Arizona Civil Rights Act because Hostin did not state such a claim in his Amended Complaint. However,

With this amendment, the panel has voted to deny the petition for rehearing. Judge Silverman has voted to reject the suggestion for rehearing en banc and Judges Noonan and Sedwick recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

---

[1] The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

The petition for rehearing is **DENIED**, and the suggestion for rehearing en banc is **REJECTED**.

A true copy
Cathy A. Catterson
Clerk of Court
Attest

/s/_____
Deputy Clerk
July 23, 2001

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 97-1102-PHX-RCB

[Filed January 31, 2000]

TERRY D. HOSTIN,	)
Plaintiff,	)
	)
vs.	)
	)
ARIZONA SCHOOLS FOR THE DEAF	)
AND THE BLIND ("ASDB"),et al.,	)
Defendants.	)
	)

ORDER

On June 25, 1997, Plaintiff Terry Hostin filed a six-count amended complaint against Defendants Arizona Schools for the Deaf and Blind ("ASDB"), Dr. Wilbur Lewis, and Dr. Kenneth R. Chiaro, Dr. Gall Harris, Karen Davis, Marcia Smith, and Joanne Tripi (collectively, the individuals who form the ADSB Board of Directors) (the "Board"). His claims arose from the Board's decision on April 4, 1996, not to renew his employment contract as a principal at the Phoenix Day School for the Deaf ("PDSD"). Per an order of December 24, 1997, the court dismissed the claims against Lewis and thinned the claims against ASDB and the Board.

The Plaintiff's remaining claims are: (1) the decision not to renew was motivated by discrimination against him because of a disability, in violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act; (2) the Defendants failed to accommodate his disability, in violation of the ADA and Rehabilitation Act; and (3) the Defendants retaliated against him unlawfully when he asserted his rights under the ADA.

Pending before the court are Defendants' Motion for Summary Judgment (doc. #61) and Plaintiff's Motion for Summary Judgment (doc. #63). In addition to the dispositive motions, Defendants have moved to strike certain affidavit testimony and exhibits submitted by Plaintiff (docs. #69, 80), and Plaintiff has moved to strike certain affidavits and exhibits submitted by Defendants (doc. #71, 82). The motions are now fully briefed and ripe for disposition.

BACKGROUND

ASDB is an agency of the State of Arizona that provides educational services to deaf, blind, and sensory-impaired schoolchildren. Defendant ASDB employed Plaintiff, a deaf male, as principal at one of its schools, PDSD. He was first hired in 1993 under a one-year contract that was subsequently renewed in 1994 and 1995 for additional one-year terms. During the term commencing July 1, 1995 and ending June 30, 1996, tension among teachers and administrators at PDSD was high and relations eventually deteriorated to outright hostility. One significant problem concerned management of the PDSD teaching staff. The organizational structure at PDSD divided teachers into teams

supervised by administrators called team leaders. Hostin was responsible for overseeing the team leaders; in turn he reported to Lewis, the superintendent of SDB. When teachers complained to Hostin about their team leaders, he consistently defended his administrative staff and his approach for dealing with them. Consequently, frustrated teachers bypassed those who were immediately responsible--that is, their team leaders and Hostin--and lodged their complaints directly with Lewis.

Interaction between Hostin and Lewis was complicated by the fact that Lewis was unable to communicate in sign language. As a result, it was important that a sign language interpreter be present when they met together. Alternatively, Hostin and Lewis used a special telephone called a Telecommunications Device for the Deaf (TDD).[1] Hostin and Lewis also used a combination of computer software and e-mail.

Hostin expected that his contract would be renewed again, but on March 21, 1996, Dr. Lewis informed Hostin that he would probably not be offered another contract. Lewis had the power to make recommendations on contract renewals to the Board and although he had recommended renewal of Hostin's contract in 1995, Lewis intended to recommend nonrenewal in 1996. On April 8, 1996, the Board adopted Lewis's recommendation not to renew Hostin's contract.

---

[1] A TDD is a portable keyboard telephone used by hearing-impaired persons to call other TDDs. Instead of speaking and listening, a user types on the TDD keyboard and reads incoming messages on a tiny screen. The messages can be printed out on tape.

After his contract was not renewed, Plaintiff was replaced by an interim administrator who was not hearing impaired. Plaintiff believed that Lewis had engaged in a pattern of discrimination against deaf or hard-of-hearing individuals employed by ASDB. He filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that ASDB discriminated against him because he is deaf. After receiving a right-to-sue letter from the EEOC, Plaintiff timely filed his complaint in this court.

MOTIONS TO STRIKE

Both parties move to strike certain affidavit testimony submitted by the other. Rule 56(e) provides that on a motion for summary judgment, only admissible evidence shall be considered. See Fed.R.Civ. P. 56(e); Kim v. United States, 121 F.3d 1269, 1276-77 (9th Cir. 1997). Affidavits and other items submitted for or against summary judgment must be based on personal knowledge. See Rule 56(e); Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996). In light of the requirement that all facts be admissible, it follows that inadmissible hearsay may not be considered. See Kim, 121 F.3d at 1277; Fong v. American Airlines, Inc., 626 F.2d 759, 762-63 (9th Cir. 1980). Conclusory statements, speculation and conjecture are also of no use. See Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996). Furthermore, it is a prudential rule that on a motion for summary judgment, a party may not rely on affidavit testimony that conflicts with deposition testimony. See Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). Before this court may reach the issue of summary judgment, it must resolve the parties' dispute about the contents of the record.

A. Defendants' motions to strike

Defendants seek to strike various affidavit testimony submitted by Plaintiff. First, Defendants consider the affidavit submitted by Plaintiff's paralegal to be hearsay. Second, Defendants wish to strike certain statements from Hostin's affidavit on the grounds that those statements are inconsistent with deposition testimony. Third, defendants wish to strike portions of the affidavits of Peggy Marko-Sprague, Ronni Zeigler, and Dr. Prickett because, among other things, the affidavits contain inadmissible hearsay. Fourth, Defendants wish to strike as irrelevant performance reviews Plaintiff received from a previous superintendent, from a school where he worked prior to coming to ADSB, and the credentials of the administrator who replaced Plaintiff.

1. Townsend's affidavit

Defendants allege that the affidavit of FranTownsend, a paralegal employed by Plaintiff's attorney, should be struck because it is hearsay. See Defendants' Motion to Strike (doc. #69) at 2. Townsend's affidavit purports to summarize interviews with prospective witnesses and characterizes the witnesses' reactions to certain questions. See Plaintiff's Statement of Facts (doc. #64), Ex. 5. Townsend further reports calling a state employee and obtaining summaries of certain record information, which she also purports to summarize. See id. Plaintiff argues that the affidavit should be excepted from the bar on hearsay evidence under Federal

Rules of Evidence 801(d)(2)(D) and 803(24).[2] See Plaintiff's Response (doc. #83) at 3. Finally, Plaintiff wishes to substitute the affidavit of Marko-Sprague for ¶ 4 of the Townsend affidavit, where Marko-Sprague's testimony is recapitulated, in all places where ¶ 4 is used to support an allegation.

Rule 56(e) requires that when affidavits are used to support or oppose summary judgment motions, they shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." See Fed. R.Civ. P. 56(e). These requirements are mandatory. See Wright, et al., 10B Federal Practice and Procedure § 2738 (1998). The personal knowledge requirement cannot be excused by hearsay exceptions. Townsend has no personal knowledge of facts, as both parties admit that her statement is pure hearsay. Moreover, the persons she interviewed are not capable of making admissions binding Defendants, so their statements are hearsay. See Fed.R.Evid. 801(d). Accordingly, Plaintiff's arguments are unavailing. Townsend's affidavit shall be stricken. The court will grant Plaintiff's motion to consider Marko-Sprague's affidavit, inasmuch as it is admissible, in place of Townsend's affidavit at ¶ 4. See Plaintiff's Response (doc. #83) at 3.

2. Hostin's affidavit

Defendants construe Hostin's affidavit to contradict his deposition testimony. See Def. Motion (doc. #69) at 4.

---

[2] The court notes that Rule 803(24) was renumbered 807 by amendment in 1997.

Defendants contend that the affidavit testimony that ASDB provided no accommodations is offered in bad faith and should be excluded. In the affidavit, Hostin avers, among other things:

> I also requested that Lewis provide a TDD system with lights and a computer with e-mail capabilities to facilitate communication with Dr. Lewis, staff and parents. Such accommodations were never provided to me by Lewis.
>
> Instead, in meetings with Dr. Lewis, I was required to use an easel to communicate with Dr. Lewis or to write my questions and responses on a tablet which was passed back and forth between us.

See Plaintiff's Statement of Facts (doc. #64), Ex. 1 (Hostin Aff.), ¶¶ 5-6. In his deposition, Plaintiff testified that he did have a TDD with lights. See Defendants' Statement of Facts (doc. #62), Ex. 2 (Hostin Depo.) at 54, 138). Earlier in his deposition, Plaintiff describes the accommodations ADSB provided when he first took the position:

> Q. [I]f I understand you correctly the school did not provide you with everything that you asked for; is that correct?
>
> A. They provided some. What I mentioned earlier. Example the TTY and the signal system in my office but not for the building wide. They only provided half of that request. The interpreter, they did not provide

> me with a staff interpreter, they provided me with contract services instead. And the computer, they gave me an old computer that was not great and wasn't able to meet my needs as a principal so I did receive that later on but not at the time of employment.

See Def. SOF (doc. #62), Ex. 2 at 30.

Plaintiff's Response clarifies that Dr. Bartley, Lewis's predecessor, provided Hostin with a TDD with lights for his office, but Hostin's request for a school-wide system was not filled by ADSB. See Plaintiff's Response (doc. #83) at 5. Given the existence of the TDD and the presence of interpreters on some occasions, written communication during person-to-person meetings was not the rule. With the explanatory response in hand, the court does not find bad faith. Moreover, questions about the quality of affidavits should be resolved against the party seeking summary judgment, which on this issue is Defendants. See 10B Wright, et al., Federal Practice and Procedure § 2738 (1998). The court will not strike Hostin's affidavit.

The issue of accommodations presents conflicting testimony about the availability of interpreters. Hostin appears to believe that Lewis had an interpreter who worked full-time for him. Hostin alleges that he asked for a similar arrangement and that this was denied to him. The problem with Hostin's argument is that he offers no support for his belief that Lewis had an interpreter dedicated to his needs. ADSB admits it employs a part-time interpreters for the ADSB administration; it claims that in-house interpreters were

often available and sometimes interpreted for Hostin during meetings.

Lewis disputes that he had a full-time interpreter at his service. Lewis states that he specifically arranged for an interpreter to be present whenever he had a meeting in Tucson with Hostin. Lewis states that when he had a scheduled meeting in Phoenix with Hostin, he expected Hostin to similarly arrange for an interpreter for their meeting. He states that Hostin had the authority and the budget to hire an hourly interpreter when necessary, but that on some occasions Hostin neglected to provide an interpreter.

Lewis also describes occasions when he would visit PDSD unannounced. He did not plan to see Hostin and did not expect Hostin to have an interpreter on those visits, and when he met with Hostin on these unexpected visits, they communicated by writing notes to each other or by TDD.

Apparently, a position for a part-time interpreter who would work on Hostin's staff was created, but it was never filled. Defendants argue there was money for Hostin to hire the services of outside interpreters whenever necessary. Hostin claims that his request for a full-time interpreter was denied for budgetary reasons; he does not describe what happened to the part-time interpreter position. He seems to believe that budget constraints precluded him from hiring contract interpreters as frequently as he wanted, but he offers no support for this belief other than the fact that a full-time interpreter was not provided. It is possible that he did not use interpreter services because he was misinformed or confused about the extent to which he could hire an interpreter, but this is not a failure of accommodation on the part of PDSD.

3. Peggy Marko-Sprague, Ronni Zeigler, and Dr. Luther Prickett

Defendants move to strike certain testimony from the affidavits of Marko-Sprague and Zeigler on account of their lack of personal knowledge to testify on certain matters. See Defendants' Motion to Strike II (doc. #80) at 3. An affiant is not competent to testify as to what others are thinking when they make certain remarks. See Coca-Cola v. Overland, Inc., 692 F.2d 1250, 1255 (9th Cir. 1982); Fed. R.Evid. 602. Inasmuch as the challenged testimony is an opinion, only opinions rationally based on the perception of the witness and helpful to determination of a fact at issue are admissible. See Fed. R.Evid. 701.

Peggy Marko-Sprague is a kindergarten teacher at PDSD and was president of the teacher's union on Campus during 1994-95. See Plaintiff's Supplemental Facts (doc. #70), Ex. A. In paragraph 5, she asserts: "At staff meetings, hearing people would make rude comments and act disrespectful to the deaf staff. If Sandy Jakobs had observed this type of behavior, she would have confronted those individuals." In paragraph 10, she states, "Deaf teachers supported Terry Hostin but were afraid to speak up for fear of losing their jobs." The court finds that Marko-Sprague has personal knowledge about the atmosphere at staff meetings and will admit the first sentence of paragraph 5. However, the court agrees that Marko-Sprague has not established a foundation to testify with respect to the remainder of paragraph 5 or to 10 and will strike these lines.

Ronni Zeigler worked in an unidentified capacity at PDSD during the relevant period. See Plaintiff's

Supplemental Facts (doc. #70), Ex. B. She characterizes the remarks of others without establishing that she was present when the remarks were made. She also attributes motives to other persons' actions without establishing a foundation for doing so. Accordingly, paragraphs 3, 5, 6, 7, 8, 18, and 21 of Ziegler's affidavit will be stricken.

The court finds that the other testimony to which Defendants object is relevant. Even if this evidence is admitted over Defendants' sound objections, Defendants will suffer no injury because the outcome of this case is not altered. Prickett's affidavit is similarly relevant but not outcome- altering. See Plaintiff's Supplemental Facts (doc. #70), Ex. C. In light of the fact that this motion accompanies Defendants' motion for summary judgment, the court will resolve the remaining issues in favor of the nonmoving party, or Plaintiff. Accordingly, Defendants' motion to strike further testimony is denied.

4. Performance reviews and other credentials

Defendants wish to exclude the performance evaluations of Plaintiff made by his former supervisor at PDSD and by his supervisors at other schools, both prior to and after his tenure at PDSD. See Defendants' Motion to Strike II (doc. #80). The position Plaintiff held prior to coming to PDSD appears to have involved significantly different responsibilities and different supervisors. These materials cannot be considered relevant to the issues of this case. The position Plaintiff currently holds in Louisiana appears to be more comparable to his position with PDSD. The evaluations indicate that his post-termination conduct seems not to be changed in certain relevant aspects. See Pl.'s

Supp. Ex. F (remarking that Hostin must become "more familiar with the 'teams' approach and to more effectively use it in administering the student life division"). The court finds the Louisiana evaluation relevant to determining Plaintiff's qualification.

Defendants also wish to exclude a letter from the University of Arizona addressed to Hostin as principal, dated May 5, 1995. See Pl.'s Supp. Ex. H. Plaintiff has submitted the letter as evidence that the woman who replaced him as an interim principal, Gabi Sorenson, was not qualified to hold his job because she did not have a principal's certificate. On this issue, Plaintiff also submits the affidavit testimony of Townsend, a payroll action form, a list of employee certification status from Phoenix Day School, and Sorensen's contract. Townsend declares that

> On March 5, 1999, I personally called the State Board of Education and with "Kathy" who stated that Gabriela Sorensen has a Supervisor's Certificate and a Standard Hearing Impaired K-12 Certificate....The Supervisor's Certificate is for personnel whose primary duties include the supervision of Instructional personnel and Certified personnel. This is not the same as a Principal's Certificate.

Pl.'s SOF Ex. 5 ¶ 7; see also Ex. 10 (payroll action form reassigning Sorensen on a temporary basis to Interim Principal). The validity of Townsend's testimony has already been discussed. The court does not consider her testimony probative. The letter from the University of Arizona does not

provide an answer to the questions Plaintiff raises--whether Sorenson needed a principal's certificate for the interim principal's job and whether she had one. See Pl.'s Supp. Ex. H. It is not clear what the letter is about--whether the University was looking up employee credentials, whether it was analyzing credentials provided by Hostin, or something else. The letter states that the writer did not have enough information to analyze Sorensen's qualifications for a curriculum specialist position. Thus, Sorensen was not evaluated by the University on her credentials to serve as interim principal, but for the position she held prior to being tapped to fill in for Hostin. Furthermore, the University did not have the necessary information to make any kind of decision; it did not claim that Sorenson was unqualified. Defendants assert she did have the proper credentials, that the letter reflects "garbage-in, garbage-out" analysis, and is therefore not proper evidence. The court finds Exhibit H irrelevant to Plaintiff's argument about Sorensen's qualification to serve as interim principal and will exclude it accordingly.

The court will discuss the other evidence on which Plaintiff relies, although Defendants have not moved to strike it. Sorensen's contract, titled "Certificated Administrative Position Contract," provides that she must remain legally certificated to perform administrative and related duties in accordance with Arizona law during the contract period. It does not provide that she must have a principal's certificate. It appears that the Board designated the "Interim Principal" job as an administrative position. Crucially, Plaintiff does not allege that the Board had no authority to appoint Sorensen interim principal, or that its action was unlawful. He cites no

Arizona law to guide this court. Accordingly, he has not sustained his burden of persuasion on this point.

5. Other matters

Defendants move to strike certain paragraphs of Plaintiff's Statement of Facts. First, Defendants object to Plaintiff's SOF ¶ 9, which asserts that Lewis set up a day "to meet with selected teachers on the PDSD campus." Defendants object to the use of "selected," claiming that Lewis met with everyone who requested a meeting. See Defendants' Motion to Strike (doc. # 69) at 5. The court finds this a contested point with evidence to support Plaintiff's characterization. See Plaintiff's Response (doc. #83). Defendants' motion to strike ¶ 9 is denied.

Second, Defendants object to Plaintiff's SOF ¶ 11, where Plaintiff asserts that Lewis "threatened to fire Ms. Jakobs [an administrator] if she did not resign." See Defendants' Motion to Strike (doc. # 69) at 5. Defendants contend, and Plaintiff does not dispute, that there is no evidence for this characterization. Defendants' motion to strike ¶ 11 is granted.

Third, Defendants object to Plaintiff's SOF 3, which asserts that Lewis had a software program installed on his and Hostin's computers that "allowed Dr. Lewis to open, read, alter and/or delete any file on Mr. Hostin's computer." See Defendants' Motion to Strike (doc. # 69) at 5. Defendants contest Plaintiff's representation about the software's capability. Plaintiff returns with exhibits to support its description of the program. See Plaintiff's Response (doc. #83) at 6, Ex. 1. Plaintiff does not allege that Lewis ever

tampered with his documents. The information about the eavesdropping and document-tampering capabilities of the software is speculative and therefore inadmissible. The court will strike Plaintiff's SOF ¶ 3.

B. Plaintiff's motions to strike

1. Lewis affidavit

Plaintiff moves to strike portions of Lewis's affidavit on the grounds that it contradicts his deposition testimony. See Plaintiff's Motion to Strike (doc. #71) at 2. Plaintiffs argue that Lewis's affidavit, coming after his deposition, is a sham. Only affidavits generated for the purpose of fabricating a factual issue and staving off summary judgment should be called "shams." See Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). An inconsistent affidavit may be admitted into evidence if the district court finds that at the time of the deposition, the deponent was confused or mistaken about the facts and the affidavit attempts to explain the error and set the record straight. Id. at 267. Here, Lewis's affidavit is not inconsistent with his deposition and therefore cannot be considered a sham, but Lewis's elaborations on hisdeposition testimony do not correct mistakes either. The question remains whether the affidavit is admissible. Where an affidavit is needlessly redundant of deposition testimony, it is inadmissible. See Fed. R.Evid. 403. The court finds Lewis's affidavit is not redundant of his deposition in that it explains more clearly Lewis's reaction to Hostin's March 27 and April 1 letters. Lewis appears to have understood--or misunderstood--Hostin's refusal to discuss settlement options without a lawyer as a refusal to discuss matters necessary to administering the school without a lawyer. See Defendants'

Statement of Facts (doc. #62) Ex. 3 ¶ 16. Lewis's deposition testimony on this subject is less clear. The evidence is pertinent to Lewis's rationale for assigning Hostin to work at home.

To the extent that Lewis's affidavit purports to offer an answer an ultimate question, such evidence is admissible. See Fed. R. Evid. 704(a). Defendants ASDB and the Board bear the burden of rebutting Plaintiff's accusation that his nonrenewal was based on discrimination. In an ADA discrimination case the burden of persuasion on intent shifts from plaintiff to defendant and back to plaintiff again. Defendants point out that during the deposition, Plaintiff never asked why Lewis did not recommend renewing his contract. See ASDB's Response (doc. #81) at 5. Since intent is material to the claim, Defendants are entitled to articulate their nondiscriminatory reasons through their decisionmaker Lewis. Plaintiff will then have an opportunity to show that the reason Lewis offers is pretextual.

2. Klinger affidavit.

Virginia Klinger is ADSB's Director of Human Resources. Based on her job and the records she is charged to maintain, Klinger describes Hostin's budget and the availability of funds for interpreters, ADSB's grievance procedure, a list of ASDB employees who are sensory impaired or deaf, and ADSB's practice of employing supervisors under one-year contracts. See Defendants' Statement of Facts (doc. # 62), Ex. 4. Plaintiff moves to strike parts of Klinger's affidavit for not disclosing certain testimony in earlier disclosures, for inadequate foundation, and for violation of the best evidence rule. See Plaintiff's

Response (doc. #74) at 4-5, 6. Plaintiff argues that Klinger is not qualified to testify about the disabled status of ADSB's employees. See Plaintiff's Reply (doc. #89) at 3. In her capacity as Human Resources Director, Klinger is qualified to state whether individuals classified as disabled for employment purposes were hired; such a statement does not require her to determine whether the individuals were disabled or not. Accordingly, the statements are admissible.

On the disclosure issue, Plaintiff does not explain how Klinger's affidavit violates Federal Rule of Civil Procedure 26. Plaintiff here asked for and received discovery in the form of a deposition of Klinger, see Rule 26(a) (5). In addition, Defendants claim that the underlying records have been turned over also. See Defendants' Response (doc. #81). Due to Plaintiff's lack of objection to Defendants' assertion on that point, the court will assume Plaintiff's discovery requests have been satisfied.

The best evidence rule does not apply. Klinger may testify about records that she is familiar with and that were prepared in the ordinary course of the school's operations. See Fed. R.Evid. 803(6). Here, Klinger avers she has knowledge of the records and that they were prepared in the ordinary course of human resources operations. To the extent Klinger testifies about matters established solely on records, rather than her own recollection and perception, the court finds her testimony to be a summary and therefore excepted from the strictures of the best evidence rule. See Fed. R.Evid. 1006.

Plaintiff raises other arguments against specific paragraphs. Plaintiff suggests that paragraphs 6 and 7 are

mutually contradictory, and paragraph 10 and 11 immaterial and irrelevant. The court finds paragraphs 6 and 7 harmonious. In paragraph 6, Klinger states that Hostin had funds to pay for interpreter services at his discretion. In paragraph 7, Klinger states that Hostin requested apart-time interpreter be hired for PDSD, but that he canceled the request and did not renew it. Plaintiff's allegation of inconsistency is conclusory and does not aid the court in finding contradiction here.

Paragraphs 10 and 11 are relevant to refute Plaintiff's allegation that a discriminatory bias animated Defendants' decision not to renew his contract. In paragraph 10, Klinger states that some of Hostin's duties were delegated to a woman who is not disabled. After nine months, the Board voted not to renew her contract. In paragraph 11, Klinger states that ADSB has employed and continues to employ deaf and other disabled persons in supervisory positions. The relevance standard is a generous one, admitting evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R.Evid. 401. Just as Plaintiff may establish an inference of discrimination if he is replaced by a non-disabled person, Defendants may attempt to refute the inference by showing Defendants' counsel. See Plaintiff's Reply (doc. #97) at 4. This argument is not supported by reference to any legal rules that would enable the court to grant Plaintiff relief. Plaintiff has failed to carry his burden of persuasion on this point.

5. Carolyn LeFever

Plaintiff has moved to strike the affidavit of Carolyn LeFever on the grounds that it is purely speculative, irrelevant and was not timely disclosed. See Plaintiff's Controversion (doc. #82) at 2; Plaintiff's Reply (doc. #97) at 4. LeFever is a teacher at PDSD and she has a hearing impairment. See Defendants' Supplemental Facts (doc. #70)-Ex. 11. The court agrees that paragraphs 4 and 5 are irrelevant and will strike them.[3] The relevant portions of LeFever's affidavit consist of her opinions of Hostin's skill in the principal's role. While she does not justify her opinion with an explanation, the opinion is relevant nevertheless to show that deaf and hearing-impaired employees of PDSD had diverse views on Hostin, contrary to Plaintiff's broad characterization of the opinions of deaf employees. The affidavit is relevant and admissible.

...

6. Terry Pritchard

Finally, Plaintiff asks the affidavit of Terry Pritchard and the attachment thereto be struck on the grounds that it is

---

[3] LeFever states: ¶ 4. I initially opposed the appointment of Dr. Will Lewis as the superintendent of Arizona Schools for the Deaf and Blind (ASDB), even on an interim basis. I initially felt that Dr. Lewis lacked the experience in deaf education that I believed was needed to be a good superintendent of ASDB. I was a plaintiff in a special action entitled Arizona Education Association, et al. v.Grant Woods. et al., brought to challenge the qualification Of Dr. Lewis and to terminate his appointment. The special action was unsuccessful.' ¶ 5. I changed my mind about Dr. Lewis. He made an effort to learn about the needs of PDSD and was a very effective administrator for ASDB.

immaterial and irrelevant. See Plaintiff's Controversion (doc. #82) at 2. Pritchard is the facilities manager at PDSD. See Defendants' Supplemental Facts (doc. #70) Ex. 10. In 1994, Pritchard was the business coordinator at PDSD and he was involved in processing equipment requisitions. Pritchard avers that at Hostin's request, a new TDD and a pair of new computers were installed in Hostin's office. One of the computers was for Hostin's secretary. The court finds the affidavit and attachments relevant to Hostin's claim that his requests for accommodation were not acted upon. Plaintiff has been free to provide evidence going to the adequacy of these accommodations. Cf. Plaintiff's Reply (doc. #97) at 5. Pritchard's affidavit is admissible. Plaintiff has moved for attorneys' fees and costs for the expense of controverting these affidavits. See Plaintiff's Reply (doc. #89). A leading treatise notes that no published case to this date has awarded attorneys' fees on this issue. See Wright, et al., 10B Federal Practice and Procedure § 2738 (1998). The circumstances here do not recommend departure from past practice. Plaintiff's motion is denied.

DISCUSSION

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and thus "that the moving'party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. See Matsushita Elec Co. v. Zenith Radio Corp., 475 U.S. 554, 577 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion

for summary judgment; the requirement is that there be no genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. See id. at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. See id. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. See id. at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. See e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987) . Here, both parties have moved for summary judgment. Cross-motions for summary judgment do not alter the standard for determining whether summary judgment is proper. See High Tech Gays v. Defense Industry Security Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990).

A. Discriminatory termination.

Plaintiff alleges that his contract was not renewed due to discrimination by ADSB and the Board of Directors against him as a deaf person. A termination on such grounds would violate the ADA and the Rehabilitation Act.[4] To prevail on his

[4] There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act. See Zukle v. Regents of University of California, 166 F3d 1041, n. 11(9th Cir. 1999); Bragdon v Abbott, 118 S.Ct. 2196, 2202(1998)(courts are required to "construe the ADA to grant as least as much protection as provided by the regulations

disability discrimination claim, Plaintiff must ultimately establish: (1) that is a disabled person within the meaning of the ADA; (2) that he is qualified, with or without reasonable accommodation; and (3) that Defendants terminated him because of his disability. See Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 271 (9th Cir. 1996).

1. Hostin's prima facie case

First, the plaintiff must establish a prima facie case. To rebut the prima facie case, the defendants must produce an explanation for their actions, that is, they must show that the employment action was taken for a legitimate, nondiscriminatory reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07. Then the burden shifts back to the plaintiff to persuade the court that the defendants' stated reason was pretextual and the true reason for the discharge was unlawful discrimination. See Bradley, 104 F.3d at 270.

a. Disabled status

Under the ADA, an individual is termed "disabled" when he or she has a physical or mental impairment that substantially limits one or more of the major life activities of the individual, a record of such an impairment, or is regarded as having such an impairment. See 42 U.S.C. § 12102(2). Plaintiff alleges and Defendants concede that Plaintiff is a disabled person within the meaning of the ADA.

b. Qualified individual

---

implementing the Rehabilitation Act.")

Under the ADA, only persons who can prove that they are capable of an employment position are able to state a claim for discriminatory discharge. See Kennedy v. Applause, Inc., 90 F.3d 1477, 1480-81 (9th Cir. 1996). Section 12112(a) provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to the hiring, advancement, or discharge of employees and other terms, conditions, and privileges of employment." A qualified individual is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." See 42 U.S.C. § 12111(8). Thus in a claim for discriminatory discharge, the plaintiff must demonstrate that he can perform the essential functions of the job with or without reasonable accommodation. See Cleveland v. Policy Management Systems Corp., 119 S.Ct. 1597, 1603 (1999). Accordingly, an individual is "qualified" for the purposes of an ADA claim when he has the present ability to carry out the essential duties of the job. Given this legal criterion's emphasis on workplace performance, past experience and educational background are less probative. Plaintiff submits that he performed well during 1993-94 and 1994-95 and was offered new contracts. See Plaintiff's Reply (Doc. # 84). His performance review for 1994 is excellent. See Plaintiff's Supplemental Facts (Doc. #73), Ex. D.

Plaintiff identifies leadership as one of his essential job functions and Defendants agree. Plaintiff defends his leadership abilities by describing the actions he took with respect to an unpopular administrator on his staff, Sandy Jakobs. Jakobs supervised a group of teachers and reported

to Hostin. Hostin stated in his deposition that he observed the problems that involved Jakobs and discussed them with her:

> From my observation it didn't matter if that person gave her a problem, she needed to learn how to work with all of them, good or bad, she needed to learn how to work with everyone. If they gave her a hard time, that is fine, just be open and listen to them and negotiate with them in a positive way.
>
> [S]he needed to work with those people and do the best she could.

See Defendants' Statement of Facts (Doc. #62), Ex. 1 at 219. While Hostin asserts that he took action to improve the situation with Jakobs, he admits no improvement was made. See Id. at 231. To further establish his qualification to serve as principal, Plaintiff submits an affidavit from a colleague who supported him, Ms. Zeigler. It is not clear what position Zeigler held at ASDB or under what circumstances she had an opportunity to observe Hostin. See id. Ex. B. He also submits the affidavit of Ms. Marko-Sprague, a kindergarten teacher at PDSD and president of the teacher's union on campus during 1994-95. See id., Ex. A at ¶ ¶ 1, 2. Marko-Sprague does not state directly that she supported Hostin's policies or admired his leadership in dealing with the union. See id., Ex A. In her capacity as union president, she was aware that there were only two grievances filed by teachers against the administrative staff during 1994-1995. See id., Ex. A at ¶ 2.

The court is not limited to considering only Plaintiff's presentation of the facts in determining whether a prima facie case has been established. See Zukle v. Regepts Of the University of California, 166 F.3d 1041, 1048 (9th Cir. 1999)(considering evidence presented by defendant to determine plaintiff had not established a prima facie case that she was qualified). The record includes the official position description formulated by ASDB for the job of principal of PDSD. See Defendants' Statement of Facts (doc. #62), Ex. 3A.[5] According to the description, the major duties and responsibilities of the position are as follows:

- Provides leadership to students, staff, parents and community, promoting excellence in education by developing and administering a positive and effective program for students enrolled at PDSD.
- Administers, coordinates and supervises academic and staff programs, needs and resources.
- Adheres to federal and state laws and rules; agency goals, policies and procedures; and Board directives.
- Participates in assessment, development, implementation and evaluation of student curriculum.

---

[5] Plaintiff has also submitted the Line and Staff Relations Policy promulgated by the Arizona School Boards Association. See Plaintiff's Response (doc. #74), Ex. 5. Plaintiff has not established this policy as an authoritative description of Plaintiff's job. Its terms are less detailed than the Position Description, but they in no way contradict the Position Description.

- Evaluates program goals, instruction and staff, recommends adjustments and carries out agency decision.
- Promotes cooperative relations with parents, community, school districts, the State Department of Education, and community groups supervising and developing activities to benefit the students and staff of PDSD and ASDB.
- Works cooperatively with other agency department heads.
- Promotes equal employment opportunity and affirmative action.
- Maintains a positive work environment.
- Supports employees as valued members of the ASDB team.
- Identifies and advocates for resources needed to operate programs for students, staff and facilities.
- Participates in budget preparation; accountable for managing the PDSD budget within guidelines and available resources.

The job description is dated May 1993 and states that the holder of the position will report to the superintendent.

Defendants contend that Hostin was not qualified because he failed to resolve personnel problems that plagued PDSD in 1995-96. Defendants contend that Hostin was aware of the problems and of his duty to improve relations. See Defendants' Supplemental Facts (Doc. #70), Ex. 1-(Hostin Depo.) at 166-67. In August 1995, Hostin's supervisor, Lewis, identified specific performance objectives for Hostin.

See Defendants' Statement of Facts (Doc. #62), Lewis Depo., Ex. 2 at 41-42. Those objectives included improving staff relations and establishing committees with specific goals and clear deadlines. See id. Despite Hostin's recognition of the problems, on November 22, 1995, Lewis sent Hostin what was titled a "Letter of Direction," beginning:

> I have come to the conclusion that I must provide you direction in how you relate to, supervise, direct and set expectations for your team leaders...."

See Defendants' Statement of Facts (Doc. #62), Ex. 3B. Lewis expresses concern about the operation of PDSD: "The problems are not going to evaporate and you and I cannot solve them without the full and complete cooperation of the team leaders." Lewis then lists several specific tasks that Hostin should do to clean up one particular "mess."

> Although you apparently told [M] you would have [F] write a letter of apology, she has not yet received any such communication. You must meet with [F] and tell him in no uncertain terms the errors he is making and follow-up in writing, including reprimands if necessary to insure that he follows your directives, does the job, the whole job and nothing less. You must tell him to read and study the policy manual and follow it or else. You need to sit down and talk with the high school teachers and learn just how poorly [F] is performing as the Team Leader, and then give him some written direction which requires

> him to assume the responsibility of his position for fair, effective leadership and administration of the high school. I want to see a copy of the letter he sends to [M] ....

Id. The letter directs Hostin that he is also to prevent Jakobs from creating more personnel problems. Even if it is true that some of the personnel problems started before Hostin arrived, see Defendants' Statement of Facts (Doc. #62), Ex. 1 at 60, Hostin does not mention any substantive recommendations that he made for improving the personnel conflicts, and his decision to hire and retain Jakobs appears to have been a point of contention among teachers. See Plaintiff's Supplemental Facts (doc. 73), Ex. B (Zeigler Aff.) ¶ 22. Hostin considers his continued support of Jakobs a legitimate difference in opinion that showed leadership.[6] Lewis found incompetence, however. Hostin failed to ensure compliance with Lewis's directive to keep Jakobs from creating further problems with staff relations.

---

[6] The two positions illustrate different understandings of leadership. Under Hostin's view, a principal is the final authority for the administration of his school, and if dissent arises, the principal should discuss matters but is not obliged to take different action or compromise. Under Lewis's view, a principal has authority to decide how to carry out the goals established by the superintendent and board. The principal may determine policy within the school so long as it is compatible with other goals. If a policy disrupts the school, the principal must be guided by the goals, rather than by commitment to his policy. If the principal fails in his duty to carry out the goals, the superintendent may step in. The case law supports Lewis's view. See Nelson, 83 F.3d 1075 (9th Cir. 1996).

Hostin argues that Lewis undermined his authority at PDSD when Lewis became directly involved in the teachers' disputes with Jakobs. See Plaintiff's Motion for Summary Judgment (doc. #63) at 4-5. Apparently, Lewis was not intensely involved in personnel issues at PDSD until Jakobs was hired in 1995. Hostin asserts that he was rendered ineffective during the 1995-96 term because of Lewis's willingness to bypass him. Hostin's argument raises cause-and-effect problems difficult to resolve on summary judgment. While it could be that Lewis invaded the principal's role and then threw out the principal, Defendants argue that Lewis supported Hostin until Lewis was convinced that Hostin was not solving problems. Lewis had evidence that the problems were dire enough to warrant intervention. See Defendants' Supplemental Facts (doc. #70), Ex. 9 ¶ 9 (Affidavit of teacher stating she was looking for another job and would leave if changes were not made).

In addition to calling Hostin's leadership capabilities into question, ADSB presents evidence of serious lapses of Hostin's judgment. First, Hostinhasadmitted he was unclear about the nature and extent of his budget responsibilities. See Defendants' Statement of Facts (Doc. #62), Hostin Depo., Ex. 1 at 38. He has not explained how he decided what his job should entail. Second, Hostin describes a March 8, 1996, faculty meeting as "the incident where everything got out of control with Sandy Jakobs." The faculty meeting ran over into classroom hours, prompting a parent complaint on March 12. More than two weeks later, on March 27, 1996, Hostin responded to the parent. See Plaintiff's Response (doc. #74), Ex. 5. In his written response, Hostin suggested that he was

not aware of the child's situation.[7] See Defendants' Statement of Facts (doc. #62), Ex. 5. Hostin did not deny misrepresenting the circumstances of a March 8, 1996 staff meeting to a parent; in fact, he was evasive when questioned at the deposition, see Defendants' Statement of Facts (Doc. #62) Ex. 1 at 231.

The court must now decide whether, in light of these facts, Plaintiff has established a prima facie case that he was qualified. In the Ninth Circuit, qualification depends on whether a plaintiff was "able" to complete essential functions

---

[7] Plaintiff attempts to explain that he meant he was unaware of the faculty meeting as it transpired, because he was out of town that day. See Plaintiff's Response (doc. #72), at 6. This explanation is called into doubt by Plaintiff's testimony, whereby he claims he was informed about the meeting in the middle of the meeting. See Plaintiff's Statement of Facts (doc. # 64), Ex. 1 (Hostin Depo.) at 190-91. Plaintiff tries to reconcile this inconsistency by insisting that Hostin meant he was not aware of the faculty meeting when it began. See Plaintiff's Response (doc. #74), ¶¶ 35, 36. Why Hostin thought it would be appropriate to emphasize he was unaware of the meeting when it began, when the parent was concerned only because the meeting had run late, is unclear. Elsewhere, Plaintiff asserts that the veracity of his correspondence to the parent is immaterial. See Plaintiff's Reply to the Defendant's Response (doc. #84), ¶ 1.

of his job.[8] The parties' arguments coincide on the point that leadership is the primary function of the principal's job. Viewing the facts in the light most favorable to the Plaintiff, Hostin did what he thought was best, took controversial positions and won the loyalty of some staff members. He had good performance reviews in the past and he has earned good performance reviews subsequently at other schools. See Plaintiff's Supplemental Facts (doc. #73), Ex. C, D, E, F. Viewing these facts in the light most favorable to Defendants, on the other hand, Hostin allowed an acrimonious feud to erupt at PDSD and did not take effective steps to resolve it. A plaintiff cannot rest his case on good performance reviews in the past. See Clay v. City of Chicago Dep't. of Health, 143 F.3d 1092, 1094 (7th Cir. 1998).

Despite the questions raised about Hostin's effectiveness, a jury could nevertheless consider Hostin an able leader on the record presented. Accordingly, the court finds that for the purposes of surviving a motion for summary judgment, Hostin has presented a sufficient prima facie case for his ability to lead and that he should be considered qualified.

c. Terminated for discriminatory reasons

---

[8] Other circuits have interpreted "qualified" to mean that the employee's "work performance meets the employer's legitimate expectations." See Ennis v. National Ass'n of Business & Educational Radio, Inc., 53 F.3d 55 (4th Cir. 1995); Leisen v. City of Shelbyville, 153 F.3d 805 (7th Cir. 1998); Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212 (8th Cir. 1999), cert. denied. --- S.Ct. ---, 67 USLW 3773, 68 USLW 3027 (1999). Cf. Matczak v. Frankford Candy and Chocolate Co. 136 F.3d 933 (3rd Cir. 1997) (holding that considering an employer's expectations are properly considered when deciding whether action was pretextual).

The prima facie case requires "evidence adequate to create an inference than an employment decision was based on a[n] [illegal] discriminatory criterion." O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996)(quoting Teamsters v. United States, 431 U.S. 324, 358 (1977) (emphasis omitted). In the context of ADA claims, if a plaintiff can show that he was replaced by someone outside the group of persons protected by the statute, he has made out a prima facie case of discrimination. See Leffel v. Valley Financial Services, 113 F.3d 787, 794 (7th Cir. 1997). Hostin has alleged that he was the first deaf principal and that since he was terminated, no deaf person has held an administrative position at PDSD. See Plaintiff's Statement of Facts (doc. # 64) ¶ 2. He further alleges that Lewis did not become directly involved when complaints were made about hearing administrators. See Plaintiff's Motion for Summary Judgment (doc. #63), at 11. The court will assume that Hostin has established facts that permit an inference that discrimination has taken place. Accordingly, he has established his prima facie case, turning the burden of going forward to Defendants.

2. Defendants' rebuttal.

ASDB has adequately rebutted Hostin's prima facie showing by offering a legitimate nondiscriminatory reason for Hostin's termination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). ADSB has offered evidence that his contract was not renewed for other reasons; namely, that Hostin failed to solve the personnel problems the PDSD faced in the 1995-95 term. The discussion above, on Hostin's qualification, lays out-sufficient evidence of a strong

difference in managerial philosophy between Hostin and ADSB. ADSB had reason to find Hostin's approach ineffectual. See Nelson, 83 F.3d at 1079 (Plaintiff's supervisor disapproved of her professional behavior); see Also Fong, 626 F.2d at 762 (employerrebutted discrimination claim by showing plaintiff violated rule, even though rule inconsistently enforced).

The Board also had cause to be concerned about Hostin's correspondence with parents, whether it was willfully evasive or simply carelessly confusing. With respect to the inference of discrimination that Plaintiff has established, based on the treatment of other deaf persons, although Plaintiff is correct that no deaf administrators had been hired at PDSD between the time he left and December 1998, Defendants have hired deaf administrators for other schools. See Plaintiff's Statement of Facts (doc. #64), Ex. 2 (Lewis Depo.) at 150.

3. Ultimate burden of persuasion

Defendants having rebutted Hostin's prima facie case, the plaintiff must prove that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory. See Lowe v. City of Monrovia, 775 F.2d 998, 1005 (9th Cir. 1985), as amended, 784 F.2d 1407 (1986); Wallis v. J. R. Simplot Co., 26 F.3d 885, 892 (9th Cir. 1994). Plaintiff has to show that his contract was not renewed on account of his deafness. To accomplish this proof, Plaintiff must show "specific, substantial evidence that the stated reasons are pretextual. Bradley, 104 F.3d at 270; accord Collings v. Longview Fibre

Co., 63 F.3d 828, 833-34 (9th Cir. 1995). This he has not done.

In support of his argument that his dismissal was pretextual, Plaintiff offers three types of argument. First, he emphasizes that he was replaced by a hearing person. He has attempted to show that his replacement lacked the appropriate credentials. To this end, however, Hostin has not submitted competent evidence.[9] However, even if the court were to consider the replacement's credentials and find them wanting, Hostin can do no more than establish a prima facie case by pointing to the experiences of his colleagues. In order to satisfy his ultimate burden, he must show evidence that he was discharged because of his disability. The argument that he was replaced by a person with substandard credentials does not speak directly to the reasons for his discharge.

Second, Hostin argues that some of his colleagues told him that they believed he was treated unfairly. None of the persons whom Hostin claims planted the idea in his mind said that his deafness was the sole reason he was terminated. See Plaintiff's Controverting Facts (doc. #74), Ex. 1 (Hostin Depo.) at 239-240. In fact, it is not clear that his colleagues ever raised Hostin's disability as a factor. Hostin himself felt that he was being bumped out because the faculty at ADSB did not like having a deaf person as the principal, See id. at 235, and he considered this to be unfair. Thus, when others told him that his downfall was "unfair," he appears to have applied his own idea of "unfair"--that is, discrimination

---

[9] Evidence on the replacement's credentials was submitted as testimony in the Townsend affidavit, which was struck, and as Plaintiff's Supplemental Facts, Ex. H, which was excluded.

because of his deafness--to his understanding of what they meant. The following deposition excerpt is revealing:

A. THE WITNESS [Hostin]: The last night when I was packing up my stuff to move out of my office, she [Gabi] came up and hugged me and she said, "I am so sorry, it doesn't seem fair, you didn't get the proper treatment from other people," and she felt really bad, and that is where I got the impression.

Q. BY MR. GOODWIN: When you say Gaby, you are referring to Gaby Sorenson?

A. Yes.

Q. And she toldyou .that she did not.think that you had been given a fair shake?

A. Yes.

Q. Well, is it your testimony that she told you that she believed you were being terminated because you are deaf?

A. She didn't say that, she said that I hadn't been treated fairly. So many things happened on campus and she didn't feel I was treated fairly.

Q. Did anyone tell you, "Terry, I think your contract is not being renewed because you are deaf?"

A. Not in those exact words but in general, the general feeling was that of all these factors that I went through, deafness seemed to be one of the top ones.

Q. The general feeling among whom? Is that your general

feeling?

THE INTERPRETER: Okay, interpreter error. Terry says he did not say one of the top ones. It was one of several factors.

Q. MR. GOODWIN: So that is your belief?
A. Yes.
Q. I just want to ask you, do you have any more knowledge other than what people said to you? Do you have any other facts in support of your allegation that your contract was not renewed because you are deaf?
A. Other than verbal communication, is that what you mean?
Q. Yes.
A. No.
Q. And again, the verbal communication that you referred to were people telling you simply that they didn't think you had been treated fairly, correct?
A. Is that your question to me?
Q. Yes.
A. Yes. Yes, I wasn't treated fairly.
Q. No, no, that is not my question.
A. Your question says referring to people telling me that they did not--they did not think that you had been treated fairly; is that correct?
Q. No, let me try to rephrase it for you, Mr. Hostin. You just a few moments ago gave me some names, Gaby Sorenson and a few others, people who said that they felt you hadn't been treated fairly, correct?

A. Right.

Q. But none of those people said," "You have been terminated or your contract hasn't been renewed because-you are deaf"; correct?

A. In general they mentioned things like the school problems, people not liking a deaf person being the director of the program, the problem with budgets and all of those kinds of things. There were several factors, and deafness was one of those factors.

Q. That is what people told you?

A. Yes ....

*****

Q. BY MR. GOODWIN: Is it your-testimony that each of those persons specifically mentioned deafness among other factors, but they have in common that they all talked about deafness; is that what you are saying?

A. If I remember--I don't remember exactly who said what, but in general that is what--that was what the comments were from them.

Id. at 236-40. Assuming that Hostin accurately remembered and related his conversations with the colleagues who supported him, none of them explained his discharge solely in terms of his deafness. Deafness, if indeed it was mentioned explicitly at all, was always one of several factors in the eyes of Hostin's friends. The consolatory remarks made by his co-workers do not prove that the Defendants decided not to renew his contract on account of his disability.

Hostin's third line of argument is that he believed he was performing well and that ADSB never gave him a negative performance review. Plainly Hostin was dismayed by the reasons Lewis offered for his recommendation of nonrenewal. "Some of these things I don't think he gave me a time, enough time to correct these things, that is why I was surprised and stunned when he accused me of all of these things." Id. at 230. Hostin's rude surprise is nevertheless not probative of ADSB's rationale for not renewing his contract. Hostin does not raise a triable issue of fact with these allegations. See Bradley, 104 F.3d at 270; accord Schuler v. Chronicle Broadcasting Inc., 793 F.2d 1010, 1111 (9th Cir. 1986).

Furthermore, Plaintiff does not answer Defendants' charges that he failed to carry out the goals set by his superiors and that he did not answer a parent's complaint in a professional manner. He does not point to his successes in other matters as an administrator; the record describes only his failure with personnel problems. The court cannot accept that long-festering personnel problems, evasiveness, and "out of control" situations characterize the performance of a competent principal. Plaintiff has not shown that Defendants' reliance on these facts was pretextual. Viewing his evidence on these comments in the light most favorable to him, the court cannot find that he has shown his discharge was pretextual.

B. Failure to accommodate Plaintiff's disability

Plaintiff's second claim alleges that Defendants' failure to accommodate his disability violated his rights under the ADA and Rehabilitation Act. Specifically, Hostin claims that

ASDB failed to provide him with a full-time sign language interpreter and that PDSD did not have TDD telephone systems connecting the principal's office to every classroom. Hostin claims that provision of these services would have been "proper" and "reasonable." See Plaintiff's Motion for Summary Judgment (Doc. #63) at 12.

The reasonable accommodation issue goes to the question of whether a plaintiff is qualified or can become qualified to perform the essential functions of his job. See Barnett v. U.S. Air. Inc., 196 F.3d 979, 988 (9th Cir. 1999). The statute defines a "qualified individual" in terms of ability to perform essential functions. "Reasonable accommodation" modifies "individual with a disability," signifying that the accommodation must enable the individual to be "qualified." The cases reflect this proposition by showing a nexus between the essential activity the employee's disability prevents him from doing, and the accommodation requested to overcome the disability. See, e.g., Barnett, 196 F.3d at 989 (employee with bad back requested"assignment that would not require heavy lifting); Nunes v. Wal-Mart, 164 F.3d 1243, 1247 (9th Cir. 1999)(employee with fainting disorder requested medical leave to learn stress-reduction exercises).

In this case, Hostin was "qualified" to be PDSD's principal because he was capable of performing his job's essential functions. Although he alleges that he should have been provided better communication services, he does not allege that he would have used them in ways that would improve his performance on the job. Because he insists that he was "qualified" without the additional services, See Plaintiff's Motion for Summary Judgment (doc. #63) at 12, his reasonable accommodation claim is inconsistent.

In one of his later submissions to the court, Plaintiff takes the position that perhaps he was not qualified but he did not know it until his contract was not renewed. See Plaintiff's Reply (doc. #84) at 6. Plaintiff focuses on his interactions with Lewis on the theory that it was Plaintiff's failure to grasp Lewis's directions that caused Lewis's dissatisfaction. See id. Plaintiff believes that the lack of an interpreter during some of his meetings with Lewis put him in the position of trying to read Lewis's mind. See id. Yet Plaintiff does not state that the problems Lewis identified, such as failure to solve the personnel problems, are unfamiliar to him. Plaintiff knew about the matters on which Lewis based his decision. The record shows that Lewis put his expectations in writing. See Defendants' Statement of Facts (doc. #62), Ex. 3B (Letter of November 22, 199S). Therefore, while the means of communication between Plaintiff and Lewis may have been less than perfect sometimes the message as communicated well enough to put Plaintiff on notice.

The problem was not with Hostin as a follower, but with his performance as a leader. He failed to solve the problems caused by his subordinates. Plaintiff never claims that he was unable to communicate with his administrative staff or the faculty effectively, with the exception of a few peripheral persons who were not involved in the fracas of the elementary department. Notably, the most controversial administrator, the team leader of the elementary department, is also deaf and communicated in sign language. Hostin lays the blame for the feuds on the poor character of the teachers and staff who fought them, and fails to see that he was supposed to stop the feuds, regardless of how they came about. Accordingly, the additional accommodations that Hostin alleges he needed would not have made a difference in

his handling of the personnel problem. This is confirmed by the nature of the reasons Defendants offered for his dismissal: Defendants' unhappiness stemmed not from the lack of communication between Hostin and his faculty and staff, but rather from Hostin's philosophy about what he should say when he communicated and what actions he should take to follow up on the decisions he made. Cf. Nelson v. Pima Community College, 83 F.3d 1075, 1082 (9th Cir. 1996) (holding that the duties of an executive employee include obedience to reasonable orders and do not extend to usurpation of others' decision-making powers).

With respect to parents, Hostin makes the point that the lack of e-mail capabilities prevented Hostin from communicating with parents via e-mail, see Plaintiff's Motion for Summary Judgment (doc. #63) at 8, but he does not claim that lack of e-mail prevented him from communicating with parents adequately. Hostin1 had a fax machine and the parent who complained sent her letter via fax. See Defendants' Statement of Facts (doc. #62), Ex. 5.

Plaintiff claims that an interpreter was necessary for him to communicate with parents and others who did not know sign language and dropped in unexpectedly. Plaintiff has not shown that he was less effective in his work due to the lack of a full-time interpreter to deal with these occasional situations. The misleading exchange with the parent did not arise from a misunderstanding, as the parent and Hostin corresponded in writing.

The evidence Hostin has presented does not support his claim that reasonable accommodation was unlawfully withheld and his disability interfered with his performance.

He merely identifies accommodations that he asserts he should have had, without establishing their effectiveness to "qualify" him for the principal's position. Accordingly, Plaintiff's reasonable accommodation claim must be denied for failure to state a claim on which relief may be granted. Cf. Memmer v. Marin County Courts, 169 F.3d 630 (9th Cir. 1999)(plaintiff did not show that accommodation provided was inadequate for purposes plaintiff requested accommodation).

C. Retaliation.

Plaintiff claims that the Defendants retaliated against him unlawfully when he asserted his rights under the ADA. Hostin alleges that he informed Lewis that "communications with Mr. Hostin should now go through Mr. Hostin's lawyer." Plaintiff's Motion for Summary Judgment (doc. # 63), at 12. Hostin alleges that consequently, Lewis assigned him to work at home from April 8 to June 30, 1996, threatened to withhold Hostin's unused vacation pay if he failed to use it by June 30, 1996, and threatened to harm Hostin's reputation. Hostin claims that his assignment was an adverse action. See Plaintiff's Response (doc. #72) at 12. Hostin further claims that Lewis's failure to explain Hostin's termination and home assignment to PDSD staff put Hostin in a false light and damaged his reputation,[10]

---

[10] Hostin's papers are not clear as to whether he wishes to consider the decision not to renew his contract an adverse decision. The court notes that the decision not to renew was taken prior to Hostin's filing a complaint with the EEOC; in fact, the nonrenewal prompted the complaint. Due to the sequence of events, Hostin cannot prove that the nonrenewal was in retaliation for the complaint. The court assumes Hostin recognizes this and does not

The ADA prohibits retaliation against a person who has asserted rights under the ADA. See 42 U.S.C. § 12203(a). To establish a claim of retaliation Hostin must show (1) that he was engaged in protected conduct, (2) that he suffered an adverse employment decision, and (3) that there was a causal connection between the employment decision and the conduct. See Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987); Barnett v. U.S. Air, Inc., 196 F.3d 979 (9th Cir. 1999); Rice v. City of Oakland, 1999 WL 355019 * 10 (N.D. Cal. 1999).

1. Protected conduct

Hostin informed Lewis by letter that he would communicate with Lewis through his attorney and that he would be filing an EEOC complaint for discrimination. Hostin refused to discuss his letter or his proposed settlement packages with Lewis.[11] See Defendant's Statement of Facts (doc. #62) ¶ 42. Defendants concede that Hostin's decisions to retain an attorney and to file a complaint with the EEOC are protected activities. See Defendant's Motion for Summary Judgment (doc. #61) at 14.

2. Adverse employment decision.

---

discuss this claim further. See Yartzoff at 1375.

[11] Lewis concluded that Hostin was unwilling to hold unmediated conversations about his job duties. See Plaintiff's Statement of Facts (doc. #64), Ex. 2 (Lewis Depo.), at 69, 166. Hostin may have meant that only a"conversation about his settlement proposals was off-limits without his attorney present. The court will assume that Lewis was mistaken hold discussions about school business.

An adverse employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2268 (1998) (citing Flaherty v. Gas Research Institute, 31 F.3d 451, 456 (7th Cir. 1994) (a "bruised ego" is not enough)). The Ninth Circuit has indicated that a transfer to an equivalent position is not an adverse action. See Nidds v. Schinder Elevator Corp., 113 F.3d 912, 919 n.3 (9th Cir. 1997). Hostin cannot show that being assigned to work at home constitutes an adverse employment decision.

Hostin was assigned to complete an analytical policy paper for the use of ASDB in its efforts to improve PDSD and to develop course descriptions for all educational programs at PDSD. See Plaintiff's Statement of Facts (doc. #64), Ex. 9 (Letter to Hostin from Lewis 4/8/96). Such work was fully compatible with his role as principal as set out in the position description. In fact, Hostin himself proposed that he work as a consultant to develop course descriptions in his April 1 letter proposing settlement alternatives. See Plaintiff's Statement of Facts (doc. #64), Ex. 7 (Letter to Lewis From Hostin 4/1/96). With respect to the policy paper, Hostin proposed that he work with a committee of parents and others to "work on betterment of the PDSD's programs." Id. Lewis's assignment focused the project and required Hostin to work by himself. That is not unreasonable. During this time, Hostin received his full pay. Hostin was also paid for his unused vacation time when he departed. See Def. Reply (doc. #87) at 6. There is also nothing unreasonable about requiring Hostin to be available to takephone calls from his supervisor during business hours. While working at home

may have been an unwelcome change, the court cannot conclude that working from home significantly changed the nature or dignity of Hostin's work.

With respect to the Defendants' failure to issue a letter explaining Hostin's reassignment to PDSD faculty and staff, Hostin offers only bald allegations that his reputation was damaged. See Plaintiff's Supplemental Facts (doc. #73) ¶ 12. The evidence Plaintiff cites does not support an inference that the affiant thought Hostin's reputation was damaged. See Plaintiff's Supplemental Facts (doc. #73), Ex. A (Marko-Sprague Aff.) ¶¶ 15-16. The court is unable to find that Hostin 'has satisfied his burden of proof on this claim.

3. Causal connection between the employment decision and the conduct

Lewis has admitted that he assigned Hostin to work at home because he believed the prospect of litigation interfered unacceptably with Hostin's ability to manage the school and Lewis's ability to communicate with Hostin. A causal connection has thus been established. However, because the action taken was not adverse, Hostin cannot prove that the employment decision was retaliatory.

CONCLUSION

Hostin cannot prevail on his claims under the ADA for he has failed to state a claim. He has not met his burden to show that the reasons offered by ASDB for terminating him were pretextual. With respect to his retaliation claim, the court finds that the employment action taken by ASDB was not legally adverse. Accordingly, summary judgment in favor

of Defendants ASDB and the Board of Directors will be granted.

THEREFORE, IT IS ORDERED, granting in part Defendants' Motion to Strike (doc. #69) and denying in part. Fran Townsend's affidavit (doc. #64, ex. 5) is ordered stricken from the record. Plaintiff's Statement of Facts (doc. #64) ¶¶ 3 and 11 are also ordered stricken from the record.

IT IS FURTHER ORDERED, granting Defendants' Motion to Strike II (doc. #80) in part and denying in part Exhibit H of Plaintiff's Supplemental Facts in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment (doc. #70) is ordered stricken from the record. Plaintiff's Supplemental Facts (doc. #70), Ex. A, paragraph 10 and the first sentence of paragraph 5 shall be stricken, and Ex. B, paragraphs 3, 5, 6, 7, 8, 18, and 21.

IT IS FURTHER ORDERED, granting Plaintiff's Controversion (doc. #82) in part and denying in part. Paragraphs 4 and 5 of Defendant's Supplemental Facts (doc. #70) Ex. 11, are ordered stricken.

IT IS FURTHER ORDERED denying Plaintiff's motion for attorneys fees (Plaintiff's Reply to Response to Motion to Strike, doc. #89).

IT IS FURTHER ORDERED denying as moot any remaining unresolved motions to strike.

IT IS FURTHER ORDERED, denying Plaintiff's Motion for Summary Judgment (doc. # 63).

IT IS FURTHER ORDERED granting Defendants' Motion for Summary Judgment (doc. #61). The clerk is directed to enter judgment for defendants and terminate this action.

DATED this 27th day of January, 2000.

/s/_____
Robert C. Broomfield
Senior United States
District Judge

Copies to counsel of record

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CIV 97-1102-PHX-RCB

[Filed December 24, 1997]

TERRY D. HOSTIN and NYLA HOSTIN, *Plaintiffs*,	)
vs.	)
THE ARIZONA SCHOOLS FOR THE DEAF AND THE BLIND, et al., *Defendants*.	)

ORDER

Plaintiff Terry Hostin filed a six-count complaint alleging violations of the Americans with Disabilities Act ("ADA") the Rehabilitation Act, 42 U.S.C. § 1983 ("§1983"), the 14th Amendment of the United States Constitution, and breach of his employment contract. On September 9, 1997 Defendants Wilbur and Jean Lewis filed a "Motion to Dismiss or, Alternatively, for Summary Judgment" (the "Lewis Motion"). On the same day,

Defendants Arizona School for the Deaf and Blind ("ASDB"), Dr. Kenneth R. Chiaro, Dr. Gail Harris, Karen Davis, Marcia Smith, and Joanne Tripi (collectively, the "Board of Directors"), filed a motion for Partial Judgment on the Pleadings. The court heard oral argument on both matters on December 1, 1997. Having carefully considered the arguments of all parties, the court now rules.

BACKGROUND

Defendant ASDB employed Plaintiff, a deaf male, as a principal at Phoenix Day School for the Deaf. Hostin reported to Defendant Lewis, the superintendent of ASDB.

Hostin was employed pursuant to a one-year contract, commencing on July 1, 1995 and terminating on June 30, 1996. Although Plaintiff apparently expected his contract to be renewed, Dr. Lewis informed him on March 21, 1996 that it would not be. Sometime in early April 4, 1996 the board of directors unanimously adopted Dr. Lewis' recommendation that Hostin not be offered a new contract. The Plaintiff was notified of this decision on April 8, 1996. Lewis offered Plaintiff four reasons for the non-renewal of his contract: incompetency, lying about the reorganization plan, hiring another administrator using the wrong application form, and failing to follow up on actions of teachers.

Plaintiff, believing that there was a pattern of discrimination against deaf individuals by Lewis, then filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The charge alleged that ASDB and Lewis discriminated against him because he was deaf. After receiving a right-to-sue letter from the EEOC,

Plaintiff timely filed his complaint with this court. He alleges violations of his due process rights, the ADA, the Rehabilitation Act, and breach of contract.

DISCUSSION

Initially, the court notes that Plaintiff concedes that Dr. Lewis is not a party to Plaintiff's employment contract, and that the state is not subject to suit on a breach of contract claim under the Eleventh Amendment. Accordingly, Plaintiff does not object to dismissal of Count VI as to all parties. Thus, the remainder of the court's analysis will focus on Counts I-V.

I. THE LEWIS MOTION

Defendants move to dismiss under Fed. R. Civ. P. 12(b)(6). Under this rule, "dismissal for failure to state a claim is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support which would entitle him to relief.'" Schowngerdt v. General Dynamics Corp., 823 F.2d 1328, 1332 (9th Cir. 1987) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)), cert. denied, 503 U.S. 951 (1992). Thus, in undertaking its analysis, the court must limit its "review to the contents of the complaint, accepting the material factual allegations as true and construing them in the light most favorable to the [non-movant]." Id.

A. Individual Liability

Dr. Lewis first challenges his (and his wife's) potential liability under the ADA or the Rehabilitation Act as stated in

Counts I, II and V of the amended complaint. He asserts that he cannot be held individually liable under either statute.

The Ninth Circuit Court of Appeals has addressed this problem in the context of Title VII and the ADEA and concluded that individual liability is not contemplated under the statutes. See Miller v. Maxwell's International. Inc., 991 F.2d 583 (9th Cir. 1993). The court explained:

> The statutory scheme itself indicates that Congress did not intend to impose individual liability on employees. Title VII limits liability to employers with fifteen or more employees...and the ADEA limits liability to employers with twenty or more employees...in part because Congress did not want to burden small entities with the cost associated with litigating discrimination claims. If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees.

Id. at 587 (citations omitted). Thus, it is well settled within this circuit that Defendants may not be sued in their individual capacity under Title VII. Id.; see also Ortez v. Washington County, 88 F.3d 804 (9th Cir. 1996). Defendants argue that the reasoning of Miller is sound whether applied to Title VII or the ADA.

Defendants assert that the ADA's definition of employer is similar to both Title VII and the ADEA: "The term 'employer' means a person engaged in an industry

affecting commerce was has twenty or more employees for each working day..." 29 U.S.C. § 630(b) (emphasis added). Defendants, in this regard, are correct. In fact, Title VII covers smaller employers than the ADA. Furthermore, courts have considered this question and concluded that the ADA, like Title VII and the ADEA, does not provide for individual liability. See EEOC v. AIC Security Investigation, Ltd., 55 F.3d 1276 (7th Cir. 1995); Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996); Cable v. Department of Dev. Serv., 973 F. Supp. 937 (C.D. Cal. 1997) (no individual liability under the ADA).

Cable is instructive on this point:

> Title V prohibits "persons" from retaliating against individuals for opposing acts made unlawful by the ADA. . . In defining the term "person," the ADA adopts the meaning given the term in 42 U.S.C. § 2000e [Title VII]....Although section 2000e(a) defines "person" as "one or more individuals," courts in the Ninth Circuit have held individuals cannot be held liable for damages under section 2000e...Given this judicial limitation on the scope of section 2000e liability, the scope of liability under the ADA is by extension similarly limited.

973 F. Supp. at 943 (citations omitted). Defendants urge the court to apply similar reasoning in the present case.

Plaintiff, on the other hand, recognizes Miller and concedes that it is controlling, but argues that it is "just flat

wrong." Plaintiff cites several district court cases disputing the wisdom of Miller. See, e.g. Vakharia v. Swedish Hosp., 824 F. Supp. 769 (N.D. Ill.); Jendusa v. Cancer Treatment Ctrs., 868 F. Supp. 1006 (N.D. Ill.).

While this court is aware of some disagreement surrounding the holding of Miller, it is also aware that other circuits follow similar logic. See e.g., AIC Security Investigation, Ltd., 55 F.3d 1276 (7th Cir.); Mason, 82 F.3d at 1009 (11th Cir.); Leonard Basic. Inst. of Tech., 55 F.3d 377, 380 (8th Cir. 1995); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994). Furthermore, the court concludes that the reasoning of Miller is sound, and that the Ninth Circuit would apply its reasoning to an ADA case such as this. As such, dismissal of counts I, II and V, as to Mr. and Mrs. Lewis, is warranted.

B. Plaintiff's Due Process Claims

Plaintiff asserts several arguments in his response to this portion of the motion to dismiss, and references his statement of facts and outside exhibits. The court, on a motion to dismiss, must limit its review to the contents of the complaint. Schowngerdt, 823 F.2d at 1332. Because the court may not consult sources not included, attached or referenced in the complaint, the court must conclude that the exhibits and statement of fact were attached in response to the alternative motion, the motion for summary judgment. Thus, only the complaint itself and the extrinsic exhibits referenced in the complaint will be considered for purposes of the motion to dismiss. With this fact in mind, the court will now consider whether the allegations contained in the complaint, when taken as true, constitute a due process violation.

The essential question is whether, as a matter of law, Plaintiff has failed to allege sufficient circumstances to show that he had a protected property interest in continued employment with ASDB, or whether his termination invoked a liberty interest. The requirements of procedural due process under the 14th amendment, applied through § 1983, are invoked only to protect the fundamental interests of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

Plaintiff must have some justifiable expectation in continued employment in order to have a property interest in his job at ASDB. A unilateral expectation is not enough. Id. at 577. Although Plaintiff completed the term of his contract, he may still have had a property interest in continued employment. State law usually dictates when a property interest exists that warrants some due process protection. Loudermill v. Cleveland Bd. Of Educ., 470 U.S. 532, 541-42 (1985); see also id. at 561 (dissenting opinion). In addition, the actions of Plaintiff's employer may have created some justifiable expectation of continued employment. Vinyard v. King, 728 F.2d 428, 431-32 (10th Cir. 1984). In other words, if some statute, policy or other circumstance existed to create a "right" in the renewal of his contract, Plaintiff may still have a property interest in continued employment with ASDB.

Initially the court notes that Plaintiff's complaint, on its face, falls far short of establishing any form of expectation of continued employment formed through any words or actions of Lewis, ASDB, the board of directors, or anyone else. The relevant portions of the complaint are as follows:

> 32. On or about March 20, 1996, Defendants Lewis and ASDB Board President Chiaro engaged in unlawful employment practices in violation of 42 U.S.C. § 1983 by giving causes for nonrenewal of Plaintiff Hostin's contract as a principal of PDSD ....
>
> 33. On or about March 21, 1996 Defendant Lewis met with Plaintiff and told him his principal's contract would not be renewed for four reasons: incompetency, lying about the reorganization plan, hiring another administrator using the wrong application form, and failing to follow up on actions of teachers.
>
> 34. Defendant Lewis provided reasons for Plaintiff Hostin's nonrenewal however plaintiff was never provided notice or opportunity to respond to the charges ....
>
> 38. Defendant Lewis provided reasons for Plaintiff Hostin's nonrenewal however plaintiff was never provided notice or opportunity to respond to the charges. Plaintiff Hostin requested and was denied a due process hearing.

(Complaint ¶¶32-34, 38). Thus, the Plaintiff failed to allege any activities at the school, or conduct of school officials that

might have provided an expectation of continued employment at ASDB.[1]

Moreover, the Plaintiff failed to establish a regular practice of contract renewal at the school.

However, the court will consider Plaintiff's employment contract, the only document reasonably "referenced" in the complaint, for evidence of a property entitlement. The contract makes no mention of mandatory renewal, but contains a clause stating: "This agreement may be terminated by mutual agreement of the parties or Employee may be discharged for cause in accordance with Arizona law." (Lewis Motion, Exhibit 1). Plaintiff argues that this clause creates a property interest by invoking Arizona Law.

Plaintiff argues that by virtue of his employment at ASDB he is covered by Arizona Revised Statute § 15-1326. This statute provides for certain mandatory minimal due process protections prior to the termination of permanent school employees. Defendants respond that, as a Principal, Plaintiff was not covered by § 151326. Rather, Plaintiff was covered by § 15-1325, as amended.

The text of § 15-1325 is clearly applicable to supervisory and managerial employees of ASDB. "The superintendent, with the approval of and acting on behalf of

---

[1] Plaintiff has argued in his response that he did not receive regular reviews and had no indication that his contract would not be renewed. Even assuming these allegations may considered on a motion to dismiss, as they were not alleged in the complaint, they fall short of establishing a property entitlement.

the board, shall issue one, two or three year contracts for the management and supervisory positions designated by the board pursuant to this section." A.R.S. § 15-1325(A). The statute further explains, "On or before April 15 preceding the expiration of the contract of a person contracted by the superintendent, acting on behalf of the board of directors pursuant to this section, the superintendent shall give written notice to the person of the board's intention to offer or not to offer the person a new employment contract." A.R.S. § 15-1325(D). Comparing the relevant portions of this statute to § 15-1326 it becomes clear that the legislature meant to differentiate between supervisory and lower-level employees.

Employees not covered by § 15-1325 are covered by § 15-1326. The latter section clearly establishes the right to due process protection once employees complete an initial probationary period: "Permanent employees discharged from employment . . . are entitled to due process protections in the manner provided by the board..." A.R.S. § 15-1326 (C). However, the legislature's decision that § 15-1325 should clearly encompass all managerial employees, and its decision to omit similar probationary and due process clauses from the section suggests an intention to limit the due process protections to employees, other than those in supervisory or managerial positions, that reach permanent status. In other words, it seems apparent that any protection provided to higher level employees should be dictated by contract, rather than some probationary or permanent status. The clause dictating the contractual nature of supervisory positions at ASDB contradicts the probationary and permanent classifications of § 15-1326. Thus, the legislature apparently intended not to automatically provide due process protection

to managerial employees. Rather, the relevant section provides contractual protection.

It is true that the contract itself provides some limited property interest. However, the contractual term dictates the amount of protection in the absence of circumstances warranting otherwise. As already noted, the Plaintiff has failed to plead any facts or circumstances establishing a property interest created through policies, expectation or practice at ASDB. Furthermore, the contract clause itself establishes no more than a right not to be terminated during the term of the contract without cause. The legislature limited any further expectation through § 15-1325. The Plaintiff has failed to establish any circumstances or terms to alter these facts.

Plaintiff also asserts that his termination implicated a liberty interest. A termination may invoke one's property rights, liberty rights or both. However, courts have defined a limited set of circumstances necessary to implicate a liberty interest. Plaintiff's allegations of deficiencies in the termination process are insufficient to establish a liberty interest. Rather, circumstances surrounding the termination must somehow invoke a liberty interest, resulting in the need for procedural protections. See Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773, 777-78 (9th Cir. 1982). Plaintiff contends that public disclosure is unnecessary to establish a liberty interest.[2] However, this contention is contrary to

---

[2] Plaintiff cites McClanahan v. Cochise College in support of this contention. 540 P.2d 744, 749 (Ariz. Ct. App. 1975). However, McClanahan does little to shed light on the requirements to establish a liberty interest. Rather, this case focuses mainly on due process protections that stem from a property

applicable case law. The Ninth Circuit has addressed this issue:

> The trial court concluded that by denying Jones a meaningful opportunity to be heard, the District infringed a liberty as well as a property interest. However, in this situation, a liberty interest is implicated only "if a charge impairs [one's] reputation for honesty or morality. The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment of the alteration of some right or status recognized by state law."]

Jones v. Los Angeles Community College Dist., 702 F.2d 203, 206 (9th Cir. 1983)(quoting Vanelli, 667 F.2d at 777-78); accord Carroll v. Robinson, 874 P.2d 1010, 1017 (Ariz. Ct. App. 1994); Hayes v. Phoenix-Talent School Dist. No. 4, 893 F.2d 235, 237 (9th Cir. 1990).

However, while public disclosure is a necessary element to establish a liberty interest, it is not clear that wide dissemination necessarily is. In fact, Carroll suggests that wide dissemination is unnecessary. "[W]e do not think that the 'public disclosure' element requires a showing of such broad publication. Since an individual's protected liberty interest concerns the ability to earn a living . . . publication

---

interest.

to a person's present or future employer constitutes public disclosure." Carroll, 874 P.2d at 1017.

Plaintiff's complaint, even taking all allegations as true, does not establish public disclosure.[3] Plaintiff complains of closed meetings, rather than public meetings, and private conversations with others. Plaintiff fails to establish any circumstances amounting to a liberty deprivation. Thus, the deficiencies in Plaintiff's complaint warrant dismissal. Accordingly, the court will not address the summary judgment motion.

...

II. ASDB AND BOARD OF DIRECTORS' MOTION

ASDB and its board of directors have moved to dismiss Counts III, IV and VI. As stated above, Plaintiff does not oppose dismissal of Count VI. Accordingly, the court will now address the parties' arguments on the remaining counts only.

Counts III and IV are the Plaintiff's due process claims. Defendants argue that the Plaintiff has no protected property or liberty interest entitling him to due process protections and that the protections contained in the Eleventh Amendment warrant their dismissal from these counts.

---

[3] In addition, it is not clear that Plaintiff has established sufficiently stigmatizing circumstances to create a liberty interest. Hayes, 893 F.2d at 237. However, Defendants did not address this argument in their pleadings and it is not necessary to do so in this decision.

Further, Defendants claim that, as state actors, they cannot be subject to an award of punitive damages. Because the court has fully addressed Defendants' due process argument when analyzing the Lewis Motion, it is clear that the court may grant this motion on these grounds. However, it will also consider the issue of Eleventh Amendment immunity as an alternative ground for dismissal of these counts.

The Eleventh Amendment protects states from suit in federal court without their permission, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). The Eleventh Amendment also bars suit against state agencies. Id. Furthermore, this amendment shields state officials, sued in their official capacity, from suits for retroactive damages. Pena v. Gardner, 976 F.2d 469, 472 (9th Cir. 1992).

In determining whether an agency is a state agency, immune from suit in federal court, the court must consider five factors: (1) whether state law treats the entity as a state; (2) whether a money judgment would be satisfied out of state funds; (3) whether the entity performs central governmental functions; (4) whether the entity has the authority to hold property in its own name; (5) whether the entity may sue or be sued; and (6) whether the entity has the corporate status of a state agency. Eaglesmith v. Ward, 73 F.3d 857, 859-60 (9th Cir. 1995); see also Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988).

Defendants contend that ASDB is a state agency and may not be sued in federal court. Plaintiff fails to dispute this

fact in his response.[4] Rather, Plaintiff makes a convoluted

---

[4] However, at oral argument, plaintiff presented an argument that the ASDB was not an arm of the state. He argued that Congress has acted to create ASDB in the form of an independent corporate body. Furthermore, Plaintiff argues that Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977), provides support for the proposition that school districts are not arms of the state. Defendants counter that Doyle dealt with Ohio school districts. In fact, the decision rested almost entirely on the unique Ohio statutory structure that vested authority in Ohio school districts that resembled that of a city or a county, rather than an arm of the state.

ADSB is not a traditional school district; rather, it is a group of schools provided as a resource for the deaf and blind throughout the state. Furthermore, Defendants argue that even school districts may be arms of the state. See Belanger v. Madera Unified School Dist., 963 F.2d 248, 253-54 (9th Cir. 1992) (examining several factors that made California school districts arms of the state) ("California has vested control of school funding in state rather than local governments. Thus, [considering this factor in conjunction with others, the] school district is easily distinguished from the Ohio school district in Mount Healthy.). Arizona courts have not yet visited the issue of whether Arizona school districts are arms of the state. Even if Arizona courts had decided this issue, it is not clearly relevant in the present circumstance.

What has been decided in Arizona is that state universities are clearly arms of the state, based in large part on the fact that Arizona universities are funded through state funds. Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1350 (9th Cir. 1981). This court concludes that ASDB is more like an Arizona university than an Ohio school district. It is a specialized institution serving deaf and blind children. ASDB depends on a voucher fund supplied by the state legislature and limited by statute. A.R.S. 15-1202(a)&(d). The school was incorporated to benefit citizens of the state. A decision against the school would be paid by the state. Moreover, it is not at all clear that Arizona courts would embrace the Mt. Healthy interpretation given an entirely different set of statutory laws. Accordingly, nothing that Plaintiff offered at oral

argument regarding Congress' ability to abrogate Eleventh Amendment immunity. Plaintiff apparently contends that the use of this congressional power to expose states to suit under the Fourteenth Amendment through the passage of Title VII, the ADA and similar statutes creates the result that states are not immune under the Fourteenth Amendment. However, the Fourteenth Amendment does not create an independent cause of action. Congress must enact laws through which individuals can remedy violations of their rights created under the Fourteenth Amendment. Congress must explicitly act intending to eliminate Eleventh Amendment immunity. See Attascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985) (superseded by statute on other grounds). That is, the congressional intent to expose states and state agencies to suit must be clear from the statute itself. Id. This intention is simply not apparent in §1983. Moreover, the Supreme Court has found that §1983 does not eliminate the states' immunity. Quern v. Jordan, 440 U.S. 332 (1979).

A more difficult question, however, involves the board members. Initially the court notes that the complaint is deficient in that, while naming the defendant board members in the caption, Plaintiff omits their names from the section entitled "Parties," that identifies plaintiffs and defendants. Furthermore, throughout the body he refers to the individuals, with the exception of Defendant Chiaro, collectively as "the board" or "the board of directors." Thus, the court can only assume that Plaintiff is suing the board of directors as a body, if at all. Defendants argue that the board of directors is a state agency and is not subject to suit. Considering the court's

---

argument warrants a different decision on the eleventh amendment question.

determination above that ASDB is a state entity, it is highly probable that the board is also a state entity. However, Defendants did not conduct any analysis to establish that the board met the six relevant factors in determining whether an entity is an arm of the state. Defendants, however, do make it clear that the board is supported by state funds and that a judgment against it would clearly be paid from state funds. The board is a body created by the legislature and its powers stem entirely from statute. In addition the legislature grants the board power to sue "in the name of the Arizona state schools for the deaf and blind." A.R.S. § 15-1323(A). Moreover, the board holds property only as a trustee for the benefit of the school. § 15-1323(B). Therefore, the court concludes that the board is a state agency and may not be sued.

Furthermore, Defendants argue that both the board and ASDB are immune from suit because they are not "persons" within the meaning of §1983. This argument has merit. The Supreme Court found that state agencies are not persons within the meaning of §1983, and therefore cannot be sued under the statute. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). On the other hand, Plaintiff's argument that board members and/or ASDB are possibly liable for prospective relief even when they cannot be held liable for damages as state actors is well-taken. Defendants do not argue with this contention. However, Plaintiff's complaint fails to include a prayer for prospective relief as to Plaintiff's due process claims. While Plaintiff asks for declaratory and injunctive relief as to the ADA and Title VII claims, a similar request is conspicuously absent as to Plaintiff's due process claims. As such, this argument also fails. Accordingly, this motion will be granted and counts III, IV and VI will be

dismissed with prejudice. The court finds that the Plaintiff has failed to establish that he had a property or liberty interest to invoke due process protections. Additionally, it finds that ASDB and its board of directors are immune from suit under § 1983.

III. Punitive Damages

ASDB and its board of directors have also moved for judgment as to punitive damages. Pursuant to the above analysis, the court will grant partial judgment on the pleadings as to Counts III and IV. Thus, the remaining counts that allow punitive damages are Counts I and V, which arise under the ADA.[5]

The ADA adopts the remedial provisions of Title VII. 42 U.S.C. § 12117. Punitive damages are available under Title VII pursuant to the Civil Rights Act of 1991. 42 U.S.C. §1981a. However, the legislature specifically limited those damages to private individuals, not governmental entities. 42 U.S.C. §1981a (b) (1). Thus ASDB its board of directors are not subject to punitive damages.

IV. Proper Defendants and Plaintiffs

Lastly, the Lewis motion argues that Mrs. Lewis is not a proper Defendant and that Mrs. Hostin is not a proper Plaintiff. ASDB joined in the Lewis motion as to Mrs. Hostin.

---

[5] Punitive damages are not available under Count II, filed in accordance with the Rehabilitation Act. ADAPT, Salt Lake Chapter v. Skywest Airlines, 762 F. Supp. 320, 325 (D. Utah 1991).

First, the court notes that spouses are usually joined in an action to invoke community property laws. For instance, when a tort is committed in furtherance of the community the community is liable, and a Defendant's spouse must be joined to insure access to community assets. See A.R.S. 25-215; see also Ronwin v. State Bar of Arizona, 686 F.2d 692, 701-702 n. 1 (9th Cir. 1981) (dissenting opinion), rev'd on other grounds, 466 U.S. 558 (1984). Considering this reasoning, Nyla Hostin is certainly not a necessary Plaintiff by any means because she will have no effect on Mr. Hostin's ability to reach the Defendant's community assets. Morever, the Plaintiff has presently dismissed his breach of contract claim, the only community claim, and now asserts only federal statutory-rights claims. As such, Mrs. Hostin, as a plaintiff, does not conform to the requirements under the asserted statutes. Mrs. Hostin lacks standing. Cf. Flammand v. American Intern. Group, 876 F. Supp. 356, 372 (D.P.R. 1994). Accordingly, the court will dismiss Mrs. Hostin as a Plaintiff. In light of its above holding, the court need not reach the issue involving Mrs. Lewis.

As a final note, Plaintiff filed, on December 16, 1997 (well after the date this matter was taken under advisement) a Rule 56(f) motion. He asks this court to continue ruling on this explanation of how additional discovery will benefit their case. Plaintiff has not even attempted to comply with the requirements of the rule. Considering this failure, the court will not consider the motion. Accordingly, as the court has already reached its conclusion on this matter, the motion will be denied as moot.

IT IS ORDERED granting Defendants' motion to dismiss as to all Counts. The clerk is ordered to terminate the

claim of Plaintiff Nyla Hostin, and enter judgment for Defendants Wilbur and Jean Lewis (doc. 5).

IT IS ORDERED denying, as moot, Defendants' motion for summary judgment (doc. 5).

IT IS FURTHER ORDERED granting Defendants' motion for partial judgment on the pleadings. Counts III, IV and VI are dismissed with prejudice as to Defendants ASDB, Dr. Kenneth R. Chiaro, Dr. Gail Harris, Karen Davis, Marcia Smith, and Joanne Tripi (doc. 6).

IT IS FURTHER ORDERED denying, as moot, Plaintiffs' Rule 56(f) Motion to Continue Ruling (doc. 20).

DATED this 23 day of December, 1997.

/s/_____
ROBERT C. BROOMFIELD
UNITED STATES
DISTRICT JUDGE

Copies to counsel of record

APPENDIX E

42 U.S.C.A. § 12101(a)

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards

and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

42 U.S.C.A. § 12112

a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control

42 U.S.C.A. § 12101(a), et al.

[subsections omitted]

U.S.C.A. § 12203

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

[subsections omitted]

APPENDIX F

REHABILITATION ACT OF 1973

29 U.S.C.A. § 794 Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

[subsections omitted]

34 CFR § 104.4 Discrimination prohibited.

(a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from

participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

34 CFR § 104.11 Discrimination prohibited.

(a) General.

(1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

APPENDIX G

A.R.S. § 12-820.01 - Absolute immunity

(A) A public entity shall not be liable for acts and omissions of its employees constituting:

(1) The exercise of a judicial or legislative function; or

(2) The exercise of an administrative function involving the determination of fundamental governmental policy.

(B) The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

(1) A determination of whether to seek or whether to provide the resources necessary for:

(a) The purchase of equipment,

(b) The construction or maintenance of facilities,

(c) The hiring of personnel, or

(d) The provision of governmental services.

(2) A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

(3) The licensing and regulation of any profession or occupation.

A.R.S. § 12-820.02 - Qualified immunity

(A) Unless a public employee acting within the scope of the public employee's employment intended to cause

injury or was grossly negligent, neither a public entity nor a public employee is liable for:

[subsections omitted]

A.R.S. § 14-1463 - Discrimination; unlawful practices; definition

(A) Nothing contained in this article shall be interpreted to require that the less qualified be preferred over the better qualified simply because of race, color, religion, sex, age, handicap or national origin.

(B) It is unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, age, handicap or national origin. .

(2) To limit, segregate or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee, because of such individual's race, color, religion, sex, age, handicap or national origin.

(3) To fail or refuse to reasonably accommodate an individuals' handicap.

(4) To fail or refuse to hire, to discharge, or to otherwise discriminate against any individual based on the results of a genetic test received by the employer,

notwithstanding subsection H, paragraph 2 or this section.

[subsections omitted]

A.R.S. § 14-1464 – Other unlawful employment practices; opposition to unlawful practices; filing of charges; participation in proceedings; notices and advertisements for employment

(A) It is an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, to discriminate against any individual or for a labor organization to discriminate against any member or applicant for membership because the member or applicant has opposed any practice which is an unlawful employment practice under this article or has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under article 6 of this chapter.

[subsections omitted]